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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 493.

FRANK MOORE, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED DECEMBER 6, 1894.

(15,744.)

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1 The President of the United States to the honorable the judges of the division number two of the supreme court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the April term, 1894, thereof, between The State of Missouri, respondent, and Frank Moore, appellant, a manifest error hath happened, to the great damage of the said Frank Moore, appellant, as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the ninth day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this tenth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
JAS. B. GANTT,
Presiding Judge.

1½ [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. State of Missouri, respondent, defendant in error, *vs.* Frank Moore, appellant, plaintiff in error. Writ of error to the supreme court of the State of Missouri, division number two. Returned and filed 15th day of September, 1894. Jno. R. Green, clerk.

Return to Writ.

STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal of the Supreme Court of Missouri.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 25th day of September, A. D. 1894.

JNO. R. GREEN, *Clerk.*

2 The United States of America to the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States; to be holden at Washington, D. C., — ninth day of *of* October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Frank Moore is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, presiding judge, division number two, of the supreme court of the State of Missouri, this tenth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

JAS. B. GANTT,
Presiding Judge.

2½ [Endorsed:] Supreme court of Missouri. State of Missouri, defendant in error, *vs.* Frank Moore, plaintiff in error. Citation. Filed September 15th, 1894. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 21st day of September, A. D. 1894.

R. F. WALKER,
Attorney for Defendant in Error.

3 Be it remembered that heretofore, to wit, on the 6th day of January, 1894, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript wherein The State of Missouri was respondent and Frank Moore was defendant; which said transcript is in words and figures as follows, to wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

At a term of the St. Louis criminal court begun and held at the city of St. Louis, within and for said city, on the first Monday of July, the same being the third day of said month, in the year of our Lord one thousand eight hundred and ninety-three, there were present the Honorable Henry L. Edmunds, judge of said court;

William Zachritz, circuit attorney of the eighth judicial circuit; Jesse A. McDonald, assistant circuit attorney of the eighth judicial circuit; Patrick M. Staed, sheriff of the city of St. Louis, and Hugh T. Patterson, clerk of said court; at which term of said court the following, among other, proceedings were had, to wit:

MONDAY, *July 3rd*, 1893.

4 This day the sheriff of the city of St. Louis makes return of the names of the persons by him summoned to appear and serve as grand jurors at the present term of this court, and who, being duly called, came, as follows, to wit, James Bannerman, Herman C. Grave, Henry Besch, David W. Guernsey, Frederick M. Crunden, Isaac M. Mason, Joseph B. Farmer, Patrick O'Malley, Frank Gaiennie, Charles W. Shirley, William J. Gilbert, George M. Randolph, twelve good and lawful men, who, being duly empannelled, are thereupon duly sworn according to law as grand jurors; whereupon the court doth appoint James Bannerman foreman of said grand jury. Thereupon the said grand jurors receive their charge from the court, and they retire to consider their presentments and such other business as may come before them.

THURSDAY, *July 20th*, 1893.

On this day the grand jury returned to the bar and through their foreman deliver the following indictment as a true bill, to wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss.*

The St. Louis Criminal Court, July Term, 1893.

The grand jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court, duly empannelled, sworn, and charged, upon their oath present that Frank Moore, late of the city of St. Louis aforesaid and State aforesaid, on the eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the city of St. Louis aforesaid, in the St. Louis criminal court, was duly convicted on his own confession of the offense of grand larceny, and in accordance with
5 said conviction was duly sentenced by said court to an imprisonment in the penitentiary for the term of three years, and was duly imprisoned in said penitentiary in accordance with said sentence, and that the said Frank Moore, after his discharge from said penitentiary, upon compliance with said sentence, afterwards, to wit, on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety-three, at the city of St. Louis aforesaid, being armed with a dangerous weapon, to wit, a pistol, the dwelling-house of S. M. Tucker, there situate and being and in which said dwelling-house there was at the time a human being, feloniously, maliciously, and burglariously did break into and enter, by forcibly turning the lock of the outer door of said dwelling-house,

with the intent then and there and thereby feloniously and burglariously to steal, take, and carry away certain goods, chattels, and personal property in said dwelling-house then and there kept and deposited, and then and there, in the same dwelling-house, forty dollars, good and lawful money of the United States, of the value of forty dollars; also three watches, all of the value of sixty dollars, of the goods, chattels, and personal property of V. P. Stephens, in the dwelling-house aforesaid then and there being found, feloniously and burglariously did steal, take, and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

JESSE A. McDONALD,
Assistant Circuit Attorney.

SATURDAY, *July 22nd*, 1893.

6 THE STATE OF MISSOURI
vs.
FRANK MOORE.

On indictment for burglary, 1st degree, and larceny and habitual criminal.

This day defendant, being in custody, is brought into court by the sheriff, and thereupon, on motion of the circuit attorney, is arraigned upon said indictment, and says he is not guilty as charged, and for trial puts himself upon the country; and the State does the same.

TUESDAY, *September 26th*, 1893.

THE STATE OF MISSOURI
vs.
FRANK MOORE.

On indictment for burglary, 1st degree, & larceny and habitual criminal.

It is this day ordered that the above cause be continued for defendant and specially set and docketed for trial on October 13th, 1893.

And at the October term, 1893, of said court the following, among other, proceedings were had, to wit:

FRIDAY, *October 13th*, 1893.

THE STATE OF MISSOURI
vs.
FRANK MOORE.

On indictment for burglary, 1st degree, and larceny and habitual criminal.

It is this day ordered that the above cause be continued by court for want of time to try and determine the same.

And at the November term, 1893, of said court, the following, among other, proceedings were had, to wit:

7

THURSDAY, *November 9th*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglarly, 1st degree, & larceny and habitual criminal.

This day the defendant, being in custody, is brought into court by the sheriff and, by leave of court, withdraws his former plea of not guilty and files his motions to quash the indictment against him; which said motions were by the court overruled.

Thereupon, on motion of the circuit attorney, defendant is again arraigned upon said indictment and says he is not guilty as charged, and for trial puts himself upon the country; and the State does the same; and, both parties being ready for trial, it is ordered that a jury come.

Thereupon came a jury, to wit, Henry C. Schultz, Henry Ehlen, Edward J. Banker, William H. Fletcher, Joseph Bauer, Peter Kerns, Julius B. Boos, William Luebbert, Louis H. Budde, George H. McConnell, Peter J. Connelly, Julius Martin, twelve good and lawful men, duly elected, tried, and sworn the issues herein between The State of Missouri, as plaintiff, and Frank Moore, defendant, well and truly to try and a true verdict render according to the law and the evidence.

Thereupon the trial of this cause proceeds and the testimony of witnesses is heard and concluded. The jurors receive their instructions from the court and the argument of counsel is heard and concluded. Thereupon the cause is submitted to the jury for a verdict in the premises, and they retire to consider thereof in charge of two deputy sheriffs, duly sworn to keep the jurors in this cause together, in the rooms set apart for juries of this court, and not to permit any one to speak to or communicate with them, nor to do so themselves, unless by order of court, or to ask them if they have agreed upon a verdict.

8

The jurors aforesaid, having agreed upon a verdict herein, are conducted into court by the officers having them in charge, and in presence of said defendant render the following as their verdict:

STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglary in the first degree and larceny.

We, the jury in the above-entitled cause, find the defendant guilty of burglary in the second degree and assess his punishment at imprisonment in the penitentiary for life.

GEO. H. McCONNELL, *Foreman.*

MONDAY, *November* 13*th*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglary, 1st degree, and larceny and habitual criminal.

Now comes the defendant, by his attorney, and files his motion for a new trial herein.

9 Thereupon it is ordered by the court that said defendant be allowed until the seventeenth day of November, A. D. 1893, in which *time* to file affidavits in support of said motion for a new trial.

FRIDAY, *November* 17*th*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglary, 1st degree, & larceny and habitual criminal.

Now comes the defendant, by his attorney, and files an affidavit in support of his motion for a new trial.

SATURDAY, *November* 25*th*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglary, 1st degree, & larceny and habitual criminal.

This day defendant, being in custody, is brought into court by the sheriff, and the circuit attorney comes, representing the State; also comes the attorney for the defendant, and the motion herein for a new trial is argued and submitted and by the court taken under consideration.

MONDAY, *December* 11*th*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglary, 1st degree, and larceny and habitual criminal.

10 Now, at this time, the court, having duly considered the motion herein for a new trial and being fully advised thereof, doth overrule said motion.

Thereupon the defendant, by his attorney, filed his motion in arrest of judgment herein.

The court, having duly considered said motion in arrest of judgment and being fully advised thereof, doth overrule said motion.

TUESDAY, *December 19th*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

On indictment for burglary, 1st degree, & larceny and habitual criminal.

Now, at this day, the defendant, being in custody, is brought into court by the sheriff to receive sentence in accordance with the verdict heretofore rendered against him.

It is therefore considered by the court that Frank Moore, for his offence of burglary in the second degree and in accordance with the verdict heretofore rendered against him, be imprisoned in the penitentiary of this State for the term of his natural life.

Thereupon the defendant, by his attorney, prays for an appeal to the supreme court of the State of Missouri from the judgment herein rendered against him; which said appeal is by the court granted.

FRIDAY, *December 22nd*, 1893.

THE STATE OF MISSOURI)
vs.
FRANK MOORE.)

11 On indictment for burglary, 1st degree, & larceny and habitual criminal.

Now comes the defendant, by his attorney, and files his bill of exceptions in words and figures as follows, to wit:

Be it remembered that on the 9th day of November, 1893, the following proceedings were had:

By leave of court defendant withdrew his plea of not guilty and filed two motions to quash *to* indictment in words and figures as follows, to wit:

In the St. Louis Criminal Court, November Term, 1893.

STATE OF MISSOURI, Plaintiff,)
vs.
FRANK MOORE, Defendant.)

Now comes the defendant in the above-entitled cause and asks the court to quash the indictment, being No. 95 of the July term of the St. Louis criminal court, for the reason that the indictment is void and illegal for duplicity, in this: that it attempts to charge the offense of burglary in two different ways in one count.

FRANK MOORE,
By JOSEPH FURLING, *Att'y.*

In the St. Louis Criminal Court, November Term, 1893.

STATE OF MISSOURI }
vs.
FRANK MOORE. }

12 On indictment for burglary, 1st degree, and larceny.

Now comes the defendant, in his own proper person and by attorney, and ask the court to quash the indictment No. 95, July term, 1893, because section No. 3959, under which the said indictment purports to charge the defendant with a former conviction, is unconstitutional and illegal and void and in conflict with the Constitution of the United States and State of Missouri.

FRANK MOORE,
By his att'y, JOSEPH FURLING.

And on the same day the court overruled both of said motions to quash the indictment, and defendant at the time duly excepted to the court's action as to each of said motions.

And upon the same day, defendant again being called upon to plead to the indictment, pleaded not guilty; and the cause coming on to be heard and a jury being called, the following proceedings were had:

In the St. Louis Criminal Court.

STATE OF MISSOURI } Charge: Burglary in the First
vs. Degree and Larceny.
FRANK MOORE, Alias MAGUIRE. }

Appearances: For State, William Zachritz, Esq., circuit attorney; for def't, none

Be it remembered that on Thursday, the 9th day of November, A. D. 1893, the above-entitled cause came on for trial before Hon. Henry L. Edmunds, judge, and the following proceedings were had:

13 The first panel of 12 jurors having been examined on their *voir dire* by the circuit attorney—

The COURT: Do you wish to ask any questions, Mr. Moore?

DEFENDANT: No, sir.

The second panel of 12 jurors having been sworn on their *voir dire*—

The COURT: Mr. Moore, the court asks you again whether you desire counsel appointed for you to assist you in your defense?

DEFENDANT: Do you put me on trial in both cases?

The COURT: What is that?

DEFENDANT: Am I going on trial on both cases?

The COURT: No; the case of burglary in the first degree and larceny.

DEFENDANT: I will take the chances with you if you will give me a fair trial.

The COURT: The court makes the statement again that it will give you as fair a trial as possible.

DEFENDANT: I simply want to bring it out from the prosecuting witnesses that there was no burglary committed at all.

The COURT: When it comes to the examination of the witnesses, the court will permit you to ask them any questions that you choose to ask them, and will endeavor to see that any illegal testimony is excluded from the case, so that you will have a fair trial, if it is possible to have one.

The second panel of 12 jurors having been examined on their *voir dire* by the circuit attorney—

The COURT: Do you want to ask the jurors any questions, Mr. Moore?

14 DEFENDANT: No, sir.

The third panel of 10 jurors having been examined on their *voir dire* by the circuit attorney—

The COURT: Do you want to ask this panel any questions, Mr. Moore?

DEFENDANT: No, sir.

The COURT: You can make your challenges now, Mr. Zacliritz, and submit them to the defendant.

Mr. ZACHRITZ: Yes, sir.

The deputy sheriff (Mr. Tucker) proffered a list of the panel and the State's challenges to the defendant.

The COURT: Mr. Moore, out of these 34 jurors you are entitled to 12 challenges and the State 10. (To Mr. Zachritz:) You have made your challenges, have you?

Mr. ZACHRITZ: Yes, sir.

Mr. Deputy Sheriff TUCKER: He says the first 12 would have done him.

The COURT: Now, under the law, Mr. Moore, you are entitled to 12 hours in which to make your challenges.

DEFENDANT: I have no challenges to make.

The COURT: Did you say you would take the first 12?

DEFENDANT: I will take the first 12 and go right on from now.

The COURT (to clerk): Strike off the State's challenges from that list, and then call the first 12 from those remaining.

The COURT to defendant: Do I understand you to say that you don't desire the 12 hours in which to make your challenges?

DEFENDANT: No, sir; I got no challenges to make.

15 The COURT: Then you don't desire the 12 hours' time?

DEFENDANT: No.

The COURT: Now, in accordance with the wish of the defendant, take the first 12 names on the list of jurors, after striking off the State's challenges.

The jury having been duly sworn to try the issues in the cause, the court cautioned the jury and took a recess until 2 o'clock p. m.

After recess further proceedings in the case at bar were had, as follows:

The State, to sustain the issues upon its part, introduced evidence as follows, to wit:

HUGH O'NEILL, being duly sworn, testified on the part of the State as follows:

Direct examination by Mr. ZACHRITZ:

Q. State your name, please.
A. Hugh O'Neill.
Q. Where do you live?
A. 2734 Allen avenue.
Q. What is your business?
A. I am a member of the Metropolitan police force.
Q. Were you a member of the Metropolitan police force in the years '76 and '77?
A. I was.
Q. What was your position at that time on the force?
A. I was a detective.
Q. Were you at that time chief of the detectives, or was it afterwards that you became chief?
A. It was afterwards.
Q. At that time you were a detective?
A. Yes, sir.
Q. Did you, in the latter part of November, '76, have occasion to arrest this defendant, Frank Moore?
A. I arrested him about that time; I don't remember the exact date.
16 Q. On a charge of burglary in the first degree and larceny?
A. Yes, sir.
Q. Were you present afterwards in the St. Louis criminal court, in January, '77, when his case was docketed?
A. I was in court at the time.
Q. Were you in court at the time he pleaded, on the 11th of January, '77—pleaded to this charge?
A. I was in court when he pleaded at that time.
Q. Is this the same defendant who pleaded to that charge on the 11th of January, '77—to the charge of larceny at that time?
A. What is the charge?
Q. I will show you the indictment and information. The indictment charges him with burglary in the first degree and larceny, and charges that on the 13th day of November, 1876, he broke into the house of one John H. Mueller——

The COURT: Don't read the charge; let him look at the paper.

A. I'd like to have the location of that house.

By Mr. ZACHRITZ:

Q. You look at the indictment and tell the jury whether this is the same Frank Moore whose name is mentioned in that indictment (handing paper to witness).

DEFENDANT: Not so. State whether there was any burglary in the case.

Mr. ZACHRITZ: I don't charge that there was any burglary in the case at all.

By Mr. ZACHRITZ:

Q. Look at that indictment and tell me whether this is the same man who is mentioned in that indictment as the defendant.

17 A. This don't state where the house is located at.

Q. The back of that indictment.

A. It don't state there.

Q. Look at this information that was issued in the court of criminal correction (handing paper to witness).

A. Yes, sir; I remember that case.

Q. I will ask you whether this defendant is the same party who was in court on this charge that I have just shown you?

A. He is the same man.

Q. The same man?

A. The same man.

Q. You made the arrest?

A. I did not; Detective Stewart made the arrest.

Q. That was in this court—in the St. Louis criminal court?

A. A. That was in this court in this city.

DEFENDANT: What is the nature of the indictment?

Mr. ZACHRITZ: The charge is burglary in the first degree and larceny.

DEFENDANT: What is the acceptation plea?

Mr. ZACHRITZ: The plea accepted was grand larceny.

DEFENDANT: And there was no burglary rendered. The judgment of the court is larceny.

The COURT (to defendant): Do you want *yo* ask the officer any question?

DEFENDANT: No, sir.

Mr. ZACHRITZ: Now, your honor, I desire to offer this record in evidence and read it to the jury.

The COURT: What is the record?

Mr. ZACHRITZ: The record is a record of this plea. (To

18 defendant:) Do you want to see this, Mr. Moore, before I offer it?

DEFENDANT: No.

Whereupon the circuit attorney read from the record of the St. Louis criminal court as follows:

STATE OF MISSOURI, Plaintiff,
vs.
FRANK MOORE, Defendant.

Indictment for burglary in the first degree and larceny.

This day the defendant, who being in custody, is brought into court by the marshal. Thereupon, on motion of the circuit attorney, the defendant is arraigned upon said indictment, and the same having been read to him, says he is guilty of larceny, as therein charged, and submits his sentence to the court. Therefore it is considered by the court that said defendant, Frank Moore, for his offense of grand larceny, as charged in said indictment, and in pursuance of his plea of guilty thereto, as aforesaid, be imprisoned in the penitentiary of this State for the term of three years; that he pay the costs of this prosecution and stand committed until this sentence be complied with.

V. T. STEPHENS, being duly sworn, testified on the part of the State as follows:

Direct examination by Mr. ZACHRITZ:

My name is V. T. Stephens; I live in Oxford, Georgia; I am married; my business, conductor for the Pullman Palace Car Company; I have been with that company something like two years.

Q. On the 26th of May, '93, where were you living?

A. I was in this city here at that time, sir.

Q. Where were you stopping?

A. I was stopping at 1507 Chouteau avenue.

Q. Whose house was that?

A. S. M. Tucker's house.

19 Q. Were you rooming there, living there?

A. Yes, sir; I roomed there, at this end of the line.

Q. That house was 1507 Chouteau avenue?

A. Yes, sir.

Q. In the city of St. Louis?

A. Yes, sir.

Q. Where—what portion of the house was your room in?

A. It was on the second floor, sir.

Q. Did you at that time know Mr. Pierce?

A. Yes, sir.

Q. Was he rooming there?

A. Yes, sir; he was rooming there.

Q. Did you also know Mr. Love?

A. Yes, sir.

Q. Do you know Mr. Claudet, a witness?

A. Yes, sir.

Q. Was he rooming there?

A. He was rooming there, sir.

Q. On that night, from the night of the 25th of May to the morning of the 26th of May, were you at home at this house, 1507 Chouteau avenue, in this city?

A. I was, sir.
Q. What time did you go to bed that night?
A. As near as I can remember, I went to bed at half past 9 or probably 10 o'clock.
Q. Did you close your door?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir,
Q. At that time did you have in your possession and as a part of your property some money?
A. Yes, sir.
Q. In that room? How much money?
A. I had about thirty-four dollars, sir.
Q. Where did you have the money?
A. In my pocket.
Q. What pocket?
A. In my pants pocket.
Q. And where were the pants.
A. I laid them on the trunk, right by my bedside.
Q. In your room?
A. Yes, sir; in my room, when I retired.
Q. Did you have a watch in your possession?
A. Yes, sir.
Q. That night and in that room belonging to you?
A. Yes, sir.
Q. What kind of a watch?
A. It was a roll-plate gold watch.
Q. And whose property?
A. Mine, sir.
Q. What was it worth, about?
A. Well, I suppose the watch was worth about $45, sir.
Q. Have you that watch now?
A. Yes, sir.
Q. Will you let me see it?
A. Yes, sir.

(Produced watch.)

Q. Is that the same watch?
A. Yes, sir.
Q. You say it was worth how much?
A. I suppose about $45.00.
Q. And your property, in your room that night, you say?
A. Yes, sir.
Q. And whereabouts did you have it in your room?
A. I had it in my vest pocket.
Q. Did you have any clothing in the room?
A. I had my regular wearing clothing—well, I had my uniform on that night.
Q. Your property?
A. Yes, sir.
Q. In the room that night?

A. Yes, sir.

Q. Had you ever known this defendant before?

A. No, sir; I never had.

Q. Did you see him in that house on the morning of the 26th of May, '93?

A. Yes, sir.

Q. About what time, as near as you can recall?

A. It was about 3 o'clock in the morning.

Q. You say you had gone to bed, had you?

A. Yes, sir.

Q. Now, tell the jury just exactly what occurred, the circumstances surrounding your seeing this man—all that occurred at that time, if you please.

A. Well, about 3 o'clock that morning I was awakened by
21 a heavy peal of thunder; there was a heavy thunder-storm passing, and I was waked up by heavy thunder, and I saw some one go out of the room just at the time I waked up, and I thought it was Mr. Love, who was sleeping in the same room, but a different bed, that night. Well, pretty soon after I saw this person go out of the room Mr. Love came by my bed and said to me that somebody had got his clothes and gone out of the room with them.

The COURT (to witness): Don't state what Mr. Love said.

WITNESS: Well, anyway, when Mr. Love passed my bed he went out, followed this person, and I told him——

The COURT: Mr. Witness, don't state what you said.

By Mr. ZACHRITZ:

Q. Go on. You went out. What occurred in the hall?

A. When I went out Moore was standing behind the door, facing of a door down in the hall.

Q. You mean this defendant was?

A. Yes, sir; was standing behind the facing of a door down in the hallway, and he said to me, when I got out in the hall, he said, "Go back; get back in that room, damn you; I'll kill you," and I says, "You got my clothes." Mr. Love had said to him, I heard Mr. Love say to him, "You got my clothes."

DEFENDANT: What did you say? State what you said.

The COURT (to defendant): You can ask him after awhile.

WITNESS: Mr. Love followed him out to the bath-room, where he had my clothes, and he says to him, "You got my clothes." Moore says, "What?" He says, "You got my clothes, and I'd like to have them back." He says, "You are a damn liar," and says, "Get back in that room or I'll kill you."

22 Q. Did you hear that?

A. Yes, sir; I heard that.

Q. Who said that?

A. Moore said that.

Q. You mean this defendant?

A. Yes, sir; Mr. Love got back in the room. As he came in I got out of the room. I says, "Mr. Love, did you get your clothes." He says, "No."

Q. Don't state that. Just state what the defendant said. What did you do then?

A. I says, "That won't do; we musn't allow this thing to happen that way."

Q. Did you go outside then?

A. I went outside.

Q. Go on.

A. Moore says then, "Get back in there, damn you; I'll kill you."

Q. To who?

A. To me.

Q. What, if anything, did he have in his possession at that time?

A. I couldn't see him; he was in the dark.

Q. Go on.

A. So I made a rush for him then. I said, "We'll mix the thing, sir." So I made a rush for him, and he was behind the facing of this door. Just as I entered the door he threw a pistol in my face and fired. The ball struck me there (indicating) and went straight back, right through my jaw-bone there, and lodged under my temple.

Q. Is it there yet?

A. Yes, sir; the bullet is in there yet; the surgeon run his probe in there about that far (indicating).

Q. Go on.

A. I had raised my hand to make a lick at the pistol, and by the time it fired I struck it with my hand and knocked it to the floor, and grabbed him with the other hand at the same time, and
23 when I snatched him up to me with this hand he bit me there (indicating) or gouged me, I couldn't say which, and then we had a very hard fight there in the hall—up and down the hall. I finally succeeded in choking him down; the officer came in and pulled me off of him.

Q. What officer?

A. Officer Gerster.

Q. Did he arrest him there at that time?

A. Yes, sir; he arrested him.

Q. Who else got there by that time?

A. Mr. Love got there about the time the officer did, and Mr. Caudet and Mr. Pierce, and there was two or three others; I don't remember now, but those three were there.

Q. Do you know the time Pierce and Caudet and Love got there or don't you? I mean, did they get there when the officer got there or before?

A. No; I don't know.

DEFENDANT: You were too excited; you don't know what you were doing.

The COURT (to witness): Just state what you know of your own knowledge.

By Mr. ZACHRITZ:

Q. Where did all this occur, now, this last scence that you described?

A. That was in the hall.

Q. In what hall?

A. In Mr. Tucker's house, on the second floor, 1507 Chouteau avenue, in this city.

Q. That is where you lived at that time?

A. Yes, sir.

Q. Now, then, when he was arrested did you recover this watch?

A. No, sir; I did not.

Q. Did you see it?

A. No, sir; I didn't see it that night; no, sir.

Q. Was it in your possession after he was arrested and
24 taken away?

A. No, sir; it was not.

Q. When did you see the watch again?

A. I saw it in the sheriff's office.

Q. And you say this is the same watch?

A. That is the same watch.

Q. That was your property and was taken away that night from you?

A. Yes, sir.

Q. Where were the clothes that were taken from you?

A. My clothes were found in the bath-room.

Q. Where were they when you saw them last that night, when you went to bed?

A. On the trunk, in my bed-room.

Q. You say that room was closed?

A. Yes, sir.

Q. Do you know, of your own knowledge, whether the front door downstairs was closed or not?

A. I don't, sir.

Q. This all occurred in this city, you have stated?

A. Yes, sir.

Q. And this is the defendant whom you got in there that night, as you stated?

A. Yes, sir.

Q. You say you never knew him before?

A. I never knew him before.

Q. What became of the pistol he shot you with?

A. The pistol was laying on the floor, right near us, when the officer came up. It was dark, you understand, and when he came up with his light he saw the pistol. He had a lantern, and picked the pistol up.

Q. Did you see him pick it up?

A. Yes, sir.

Q. Was that in the same hallway?

A. Yes, sir.

Q. Was that where he was arrested by officer Gerster?

A. Yes, sir.

25 Q. How long were you laid up with that injury?

A. I was laid up five weeks. I was off of my business five weeks. I was actually confined to the house four weeks.

Q. How much money was taken out of your room?

A. There was about thirty-nine dollars, I think, sir.

Q. Did you see that afterwards?

A. No, sir; I did not.

Q. You don't know what became of that?

A. No, sir; well, the first evidence I saw of his having taken my money was my purse lying on the floor of the bath-room after the scuffle—after the fight was over.

Q. Was that where you had seen him?

A. Yes, sir; found my purse lying there; that did formerly have three ten-dollar bills in it. There was nothing in it when I found it.

Q. Those 3 ten-dollar bills were gone, were they?

A. Yes, sir.

Q. You don't know what became of them, do you?

A. No, sir.

Q. Did you have any conversation with the defendant in the jail with reference to those 3 ten-dollar bills?

A. Yes, sir.

Q. State what that was.

A. I asked him what he did with them, and he said he threw them out in the street before the officer searched him.

Cross-examination by the defendant:

Q. Was there anybody rooming with you that night, Mr. Stephens?

A. Yes.

Q. Do you know what time he went into your room?

A. Yes.

Q. What time?

A. He went in there the same time I did, about half past 9.

Q. Don't you know you left your door right open?

A. No; I did not.

26 Q. How did you fasten the door?

A. It was not fastened.

Q. It was not fastened?

A. No; it was not.

Q. Then it was open?

A. Only closed.

Q. Just on the lock?

A. Yes.

Q. Your window also was open, wasn't it?

A. I couldn't say whether the window was open or not.

Q. But your door was only on the knob?

A. Yes; that is it.

Q. Now, ain't you sure it was wide open?

A. It was not.
Q. You are satisfied it was unlocked?
A. It was closed, the door, when I went to bed.
Q. How do you know I shot you?
A. I was there and I saw you when you did it, and I caught you and held you.
Q. You saw me? You say the hall was dark and you couldn't see?
A. I held on to you, though, until they brought a light.
Q. You held on to me?
A. Yes, sir.
Q. Well, then, did I shoot you after the light was brought?
A. No, you shot me before the light was brought.
Q. How could you see?
A. I saw your hand. There was light enough for me to see you when you took your face from behind the facing of the door, and I pulled you from behind there.
Q. But your door was unfastened?
A. It was not fastened.

By the COURT:

Q. You mean, Mr. Stephens, that the door was shut?
A. It was shut; yes, sir.

By the defendant:

Q. Was it locked or bolted?
A. It was not locked.

By the COURT:

Q. And not bolted?
A. Well, a catch-bolt.

By the defendant:

Q. The catch of the knob?
A. The turning of the knob would open the door.

By Mr. ZACHRITZ:

27 Q. And you say you held him there until Officer Gerster came?
A. Yes, sir.
Q. And you turned him over to the officer?
A. Yes, sir.

Mr. ZACHRITZ: I desire, in connection with this record here, to offer the commitment to the penitentiary in '77. Do you want to see it, Mr. Moore?
DEFENDANT: Oh, I was there.

Whereupon the circuit attorney read said commitment in evidence as follows:

COUNTY OF ST. LOUIS, *ss*:

The State of Missouri to the marshal of the county of St. Louis, Greeting:

Whereas, on the 11th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at our St. Louis criminal court, before our judge thereof, Frank Moore was convicted of grand larceny and sentenced to imprisonment in the penitentiary of the State of Missouri for the term of three years, and to pay the costs of the prosecution in that behalf accrued, these are, therefore, to command you to take the body of the said Frank Moore in your custody and convey him to said penitentiary of the State of Missouri, the keeper whereof is hereby commanded to receive said Frank Moore and him there keep for the said term of three (3) years from date of sentence, or until he shall be discharged by due course of law; and you are further commanded to make return on this writ within thirty days from date how you execute the same.

Witness Andrew J. Clabby, clerk of our said court, *seal* with the seal thereof hereto affixed, at the office, in the city of St. Louis, this 13th day of Jan., A. D. 1877.

(Signed) ANDREW J. CLABBEY, *Clerk.*

28 Indorsed.

Executed this writ on the twenty-third day of January, A. D. 1877, by delivering the body of the within-named Frank Moore to the keeper of the penitentiary at Jefferson City.

(Signed) ISAAC M. MASON,
Marshal, St. Louis County.

24th January, 1877.

THOMAS PIERCE, being duly sworn, testified on the part of the State as follows:

Direct examination by Mr. ZACHRITZ:

Q. State your name, please.
A. Thomas Pierce.
Q. Where do you live?
A. I live at 2250 University street now.
Q. What is your business?
A. I am a machine hand, working for the Globe furniture factory.
Q. On the 26th of May, '93, where were you living?
A. I was living — 1507 Chouteau avenue.
Q. In this city?
A. Yes, sir.
Q. Whose house were you at?
A. Mr. S. M. Tucker, I believe.
Q. Were you boarding there?
A. Yes, sir; I just came in town, and I was stopping with my brother.

Q. Were you in the house that morning, the morning of the 26th of May, '93?

A. Yes, sir.

Q. And where was your room with reference to Mr. Stephens' room?

A. Mr. Stephens' room? His was on the second floor and mine was on the third floor.

Q. What time did you retire that night, as near as you can remember?

A. I suppose between 11 and 12 o'clock.

Q. That night?

A. Yes, sir.

29 Q. Well, then, when you retired you went to your room, I suppose? Did you close the door?

A. Yes, sir.

Q. Did you have any property belonging to you in that room in your possession that night?

A. Yes, sir; I had two dollars in money and a watch—a silver watch.

Q. In the room that night?

A. Yes, sir.

Q. Did you close your door?

A. Yes, sir; I shut the door; I didn't lock it.

Q. Do you remember whether you locked it?

A. No, sir; I didn't lock it.

Q. You shut it?

A. Yes, sir.

Q. You say you had a silver watch?

A. Yes, sir.

Q. Where did you have the watch?

A. Had it in my pants pocket. A. The pants were at the head of the bed, hanging on a chair.

Q. That was in your room, was it?

A. Yes, sir.

Q. Is that the watch (handing a watch to witness)?

A. Yes, sir; it is the watch.

Q. Eh?

A. Yes, sir.

Q. Well, what occurred after you got to bed?

A. Well, I didn't know anything about it until, I suppose, between 2 and 3 o'clock in the morning.

Q. What time?

A. Near 3 o'clock in the morning I heard a pistol shot and I heard some one hallooing, "Come on, boys, I've got him." By the time I got downstairs the policeman or officer had him in charge then.

30 Q. What officer?

A. I don't know his name.

Q. That officer in there (circuit attorney's office) you mean?

A. Yes, sir.

Q. Had who in charge?

A. That gentleman, Mr. Moore.
Q. This defendant?
A. Yes, sir.
Q. Where were they?
A. They were in the hallway.
Q. What hallway?
A. It is on the second floor of the residence or boarding-house of this same number.
Q. 1507 Chouteau avenue?
A. Yes, sir.
Q. Who else was there besides the officer and prisoner?
A. The gentleman that was shot, and also Mr. Love and Chaudet.
Q. You say the gentleman he shot. Who is that?
A. Mr. Stephens.
Q. Did you see Mr. Stephens there?
A. Yes, sir.
Q. Tell the jury—did you notice his face? What was his condition—his face?
A. He seemed to be a little frightened over it still. I didn't know how badly he was shot. The bullet went in right here, about his mustache (indicating).
Q. That is what I want to know. Did you see the place where he was shot?
A. Yes, sir; I seen the place where he was shot.
Q. And you say this prisoner was in charge of Officer Gerster that time?
A. Yes, sir.
Q. And you say this watch was in your possession when you went to bed, about 11 o'clock?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. When did you see it next?
A. I saw it down here in court.
31 Q. That was after the arrest?
A. Yes, sir.
Q. The same watch?
A. Yes, sir.
Q. And this is the man?
A. Yes, sir; that is the man.
Q. Did you get a good look at him that night?
A. Yes, sir.
Q. Was there a light there?
A. By lamp light.
Q. Well, did they have a light there?
A. No; I didn't see him in the light; it was dark when I seen him, but I seen him next morning down here.
Q. You saw him next morning?
A. Yes, sir.
Q. At any rate, you knew Officer Gerster?

A. No, sir.
Q. The officer in there. You saw him in there?
A. Yes, sir; I saw him.
Q. And he had the prisoner in charge?
A. Yes, sir; he did.

Cross-examination by the defendant:

Q. How could you see Officer Gerster and not see me?
A. I seen you.
Q. Eh?
A. I saw you that night.
Q. What time did you go to bed?
A. I went to bed about 11 o'clock, I suppose.
Q. How long had you been boarding there?
A. Well, I hadn's been there but three or four days, I suppose.
Q. How long have you been boarding there since?
A. Me? I boarded there three or four days afterwards.
Q. Is that all?
A. Yes, sir.
Q. Did you ever find the front door locked when you went in there at night? Didn't you always find the front door of the house open?
A. I never was out late at night.
32 Q. What is the latest you ever went in?
A. I suppose between 10 and 11 o'clock.
Q. About how many people were boarding in that house?
A. I couldn't say.
Q. Did you ever find any difficulty in getting in through that front door? When you got in, late or early, you always found the front door open?
A. Yes, sir; I did.
Q. And your own door?
A. No, sir; my door was generally locked, and my two brothers——
Q. But on this night when you lost your watch was your door locked?
A. No, sir; it wasn't locked.
Q. It was open that night?
A. Closed.
Q. It wasn't locked?
A. No; it wasn't locked.

By Mr. ZACHRITZ:

Q. It was closed, however?
A. Yes, sir.

By the defendant:

Q. But it wasn't bolted, it wasn't fastened?
A. Only fastened with the latch.
By Mr. ZACHRITZ: Just closed, like that door is closed now?

A. Yes, sir; just the same.
Q. It requires some force to open it?
A. Yes.

JULIAN CHAUDET, being duly sworn, testified on the part of the State as follows:

Direct examination by Mr. ZACHRITZ:

Q. What is your name?
A. Julien Chaudet.
Q. Where do you live?
A. 1507 Chouteau avenue.
Q. What is your business?
A. Printer.
Q. Where were you residing on the 26th of May, '93?
A. 1507 Chouteau avenue.
33 Q. At whose house?
A. S. M. Tucker's.
Q. Were you at home on the morning of the 26th—that is, the night from the 25th to the 26th of May, '93?
A. Yes, sir.
Q. What time did you get to bed, about, as near as you can remember?
A. I think I went to bed that night at half past ten.
Q. Where was your room in reference to Mr. Stephens' room?
A. Just above it.
Q. You mean on the floor above it?
A. Yes, sir.
Q. Had you known this defendant before that night at all?
A. No, sir.
Q. Now, did you see him that morning—the morning of the 26th of May, '93?
A. Yes, sir.
Q. Did you see him in the house?
A. Yes, sir.
Q. State to the jury the circumstances—what it was that aroused you and what you saw; just tell the jury all about it.
A. I think the first thing I remembered was being aroused right suddenly by a room-mate saying that somebody——
Q. Don't tell what anybody said. You were aroused, were you?
A. Yes, sir.
Q. Where did you go?
A. I came downstairs.
Q. Where—what part of the house?
A. Right down just at the foot of the steps.
Q. Now, what did you see there?
A. I came down twice. Went back upstairs the first time. I thought it was somebody else, and I came down the second time, and I saw Mr. Stephens and that gentleman there (pointing toward defendant) in a scuffle; saw blood all around.
34 Q. Did you hear a pistol-shot that night?

A. Yes, sir.
Q. Was that before or after you saw Stephens in the scuffle?
A. Before.
Q. You say you saw blood?
A. Yes, sir.
Q. Who was bleeding?
A. Mr. Stephens.
Q. What part of the body—where was the blood?
A. Well, he looked like he was bloody all over; pretty much all over.
Q. All over, was he?
A. Yes, sir.
Q. What was Moore doing? Just tell what you saw there.
A. It looked to me like they had been struggling. I got there about the time the officer did, and Moore had quit struggling then.
Q. Just state what occurred then, either by Mr. Moore or Mr. Stephens, in your presence.
A. Just Mr. Stephens talking. I don't think I heard him (defendant) say anything at all. In fact, there was so much said around there a person wasn't calculated to remember what was said.
Q. Did you get there about the same time Officer Gerstner got there?
A. Yes, sir.
Q. Is this the man that Gerstner arrested?
A. Yes, sir.
Q. Is this the man that Gerstner arrested that you saw Stephens struggling with?
A. Yes, sir.
Q. Did you see a revolver?
A. Yes, sir.
Q. Where did you see it?
A. Officer Gerster had that.
Q. Where did he get it?
A. He picked it up off the floor.
Q. Did you see him pick it up?
A. No, sir; I didn't see him pick it up.
35 Q. You saw him have it?
A. Yes, sir.
Q. Is this the same man that you saw Mr. Stephens struggling with that night?
A. Yes, sir.
Q. And whom Gerster had in custody?
A. Yes, sir.
Q. Did you see any property that night?
A. No, sir; not that night.
Q. Did you go to the station?
A. Not that night.

Cross-examination by defendant:

Q. Are you boarding at that house yet?
A. Yes, sir.
Q. How long have you been boarding there?
A. Since about the 2nd of February.
Q. At what time, generally, do you return and get into that house at night?
A. Well, any time.
Q. Did you ever find any difficulty in getting in? Haven't you always found the front door of that house open?
A. No, sir.
Q. No?
A. No, sir.
Q. When did you ever find it closed?
A. Why, all the time.
Q. All the time find it closed?
A. Yes, sir.
Q. On the knob?
A. Yes, sir.
Q. Then you just turned the knob and went in?
A. Yes, sir.
Q. You didn't have time to pull the bell or kick the door or anything?
A. Sometimes we did and sometimes we didn't.
Q. As a general thing, you just turn the knob and go in?
A. I haven't been out lately.
Q. Previous to the commission of this offense that I am getting tried on, previous to that—previous to last May, when you went in there—you always got hold of the door knob and walked
36 in, if the door wasn't already ajar?
A. Yes, sir.

By Mr. ZACHRITZ:

Q. You didn't hear any bell ring just before he was arrested in there?
A. No, sir.
Q. No bell rung?
A. No, sir.

ANDREW GERSTER, being duly sworn, testified on the part of the State as follows:

Direct examination by Mr. ZACHRITZ:

Q. State your name, please.
A. Andrew Gerster.
Q. You are a police officer?
A. Yes, sir.
Q. Central district?
A. Yes, sir.
Q. How long have you been on the force?

A. About 14 years.

Q. On the 26th of May, '93, you were on the police force, were you, in the central district?

A. Yes, sir.

Q. Was Mr. Tucker's house on your beat?

A. No, sir; opposite.

Q. Did you know the place 1507 Chouteau avenue?

A. I did.

Q. Who occupied the house?

A. A fellow by the name of Mr. Tucker.

Q. On the morning of the 26th of May, '93, did you arrest this defendant, Frank Moore?

A. Yes, sir.

Q. State, first, where you were and what attracted your attention and where you went and what you saw.

A. I was in the Turner Hall entrance, to keep out of the rain.

Q. Where is that?

A. 1508 Chouteau avenue, and I heard some noise and heard 'em hollering "watch" somebody. I stepped across the street there and I heard somebody making the remark, "There is a burglar in the house." I ran upstairs.

Q. Upstairs where?

A. On the second floor.

Q. What house?

A. 1507 Chouteau avenue—Tucker's house.

Q. Go on.

37 A. I found two men standing there, one of the two covered with blood, and two men holding Moore down on his back.

Q. Holding this defendant down on his back?

A. Yes, sir.

Q. Who was covered with blood?

A. Tucker was covered with blood, and one of the other parties I don't know.

Q. Who was holding Moore down?

A. Stephens and Love.

Q. Did they seem to have an easy time of it?

A. No; they had a severe struggle with him there, to hold him down.

Q. Did you see a pistol?

A. The pistol was laying within about two inches of his knee—right knee.

Q. Whose knee?

A. Moore's knee, on the floor.

Q. What was he doing at that time?

A. He was laying on his back.

Q. Did you pick up the pistol?

A. I picked the pistol up first.

Q. Is this the pistol (handing pistol to witness)?

A. Yes, sir; this is the pistol.

Q. How many chambers were in it?

A. There was six chambers; one of 'em was empty, entirely empty, and the other one had an empty shell.

Q. One was entirely empty and there was an empty shell, and what was in the other four?

A. Loaded.

Q. Are these the cartridges (showing cartridges to witness)?

A. They were bullets similar to it.

Q. You saw them taken out of it in the office?

A. Yes, sir.

Q. This is the same pistol?

A. Yes, sir; that is the same pistol.

Q. What caliber is this?

A. I think 41.

38 Q. Do you think that would hurt a man?

A. I think it would.

Q. You say you saw Moore on his back and these two men holding him down, and you say the pistol was there and you picked up the pistol?

A. The pistol was laying within two or three inches of his knee.

Q. What occurred at that time?

A. Stephens said that he shot him.

Q. That who shot him?

A. That Moore shot him.

Q. Well?

A. And said that he had his watch and some money.

Q. Stephens said that?

A. Yes, sir.

By the COURT:

Q. He said it in Moore's presence?

A. Yes, sir.

The COURT (to witness): Don't state anything that anybody told you, unless he was present and heard it.

By Mr. ZACHRITZ:

Q. Did you get any watches in his possession?

A. After I got to the station—on the way to the station or to the patrol box—that nickel watch there, right outside the door, within a few feet of the door, he reached with one hand in his pocket and threw the watch down.

Q. Who did?

A. Moore did.

Q. Did you see that?

A. Yes, sir; I seen him throw it down.

Q. Is this the watch you speak of (handing a watch to witness)?

A. Yes, sir.

Q. You saw him throw that away?

A. Yes, sir.

Q. And you recovered it afterwards?

A. Yes, sir.

Q. When you got down to the station did you find any other property?

A. I did.

39 Q. What did you find?

A. Found a gold watch—a hunting-case gold watch.

Q. See whether this is the watch (handing watch to witness)?

A. Yes, sir; that is the watch.

Q. What was done with the watch?

A. Taken in charge by the officer.

Q. Was it shown to Mr. Stephens?

A. Not while I was there.

Q. Well, this is the same watch you found in his possession?

A. That is the same watch I found in his possession.

Q. Now, I will ask you what, if anything, the prisoner said in your presence at any time?

A. We questioned him there in regard to the shooting.

DEFENDANT: Am I on trial for that case—for the shooting case?

Mr. ZACHRITZ: You may if you wait long enough.

DEFENDANT: With reference to this transaction?

The COURT: With reference to either burglary or larceny.

DEFENDANT: I have been on trial all the time for shooting the man. I am on trial here before this jury for the burglary, and all the evidence that has been in so far is for shooting somebody.

The COURT: In connection with the transaction. Proceed with the examination.

By Mr. ZACHRITZ:

Q. State what, if anything, he said.

A. He stated when questioned about the shooting at the railing downstairs, the fellow wouldn't take the bluff and he shot him. He shot him in the face.

Q. The fellow wouldn't take the bluff and he shot him in

40 the face?

Q. The fellow wouldn't take a bluff and he shot him in the face?

A. Yes, sir.

Q. That all occurred in this city?

A. Yes, sir.

Q. And this is the same man you testified about (pointing toward defendant)?

A. Yes, sir.

Cross-examination by the defendant:

Q. You picked up the revolver that you found on the floor?

A. I picked up the revolver; yes.

Q. There was six chambers in it, one chamber empty and one chamber shot off—six chambers?

A. Yes.

DEFENDANT (to Mr. Zachritz:) Will you procure that revolver?

(Mr. Zachrits hands revolver to witness.)

By defendant:

Q. Please look in that and see if there is not over five chambers in it; see is that is the same revolver—the court promised to protect me in this case a little bit—if that is the same revolver, if that is the same revolver, and if there is more than five chambers in it.

A. (Witness examines revolver.) This is the same revolver.

Q. It ain't.

A. It is; but I see there is only five.

Q. How do you know it is the same revolver at all?

A. There is the mark here (indicating) which I put when I came to the station.

Q. You scratched it?

A. Yes.

Q. Where did you find it?

A. I found it laying within two or three inches of your knee, on the floor.

Q. How do you know it is mine?

41 A. Because it was laying alongside of you.

Q. Wasn't it laying alongside of somebody else?

A. And I was told that you fired the shot. There was nobody else had a pistol there.

Q. How did you get into the house?

A. Through the front door.

Q. Was the front door open?

A. It was open when I came in; yes.

Q. You didn't have any difficulty in arresting me, or anything like that?

A. No.

Q. I went with you nice and quiet?

A. You went with me right quiet; yes.

Q. Well, that is the same six-chambered revolver?

A. No; it has five chambers; I made a mistake in the chambers.

Q. Awhile ago there was six chambers in it, and now it is only five, but you are still positive it is the same revolver?

A. Yes, sir.

Redirect examination by Mr. ZACHRITZ:

Q. He went with you nicely and quietly, did he?

A. He went with me nice and quiet.

Q. He didn't have this pistol loaded in his hand while he was with you?

A. No; I had him covered with the pistol while I had him in the wagon.

Q. You also had this pistol, and had the nippers on him and this?

A. Yes, sir.

Q. And you also had the nippers on him, did you?
A. Yes, sir.
Q. And he went along nicely and quietly with you?
A. Yes, sir.

42 The circuit attorney offered in evidence the revolver and the watches, and handed them to the jury.

Here the State rested its case-in-chief.

The COURT (to defendant): Do you want to introduce any testimony?

DEFENDANT: Yes, sir; I'd like to offer some testimony in my own behalf.

The COURT: You mean to be sworn as a witness in your own behalf?

DEFENDANT: Yes, sir.

FRANK MOORE, being duly sworn, testified in his own behalf as follows:

The COURT: You can proceed to testify now, Mr. Moore. Just state your name first.

WITNESS: Well, my name is Frank Moore.

The COURT: Are you the defendant in the case?

WITNESS: I am the defendant in the case.

The COURT: Now you can proceed to state anything that you care to state about this.

WITNESS: On the night of the commission of this offense, 23rd of May, wasn't it?

Mr. ZACHRITZ: The indictment alleges the 26th of May.

WITNESS: Well, on that night I was walking up Chouteau avenue, it was raining hard, and I seen the door of this place ajar, and I stepped into this house. I went into Mr. Stephens' room. I took his clothes out into the bath-room and I searched them. I pulled out his watch. It was that watch on the table there. I looked at
43 it. It was just twenty minutes to three. I concluded to go back into that room. I went back. I picked up another man's suit of clothes in the room, named Love from what I have found out since, and carried them out into the bath-room. Just as I picked them up a hard clap of thunder occurred and it woke up both men in the room. I walked out into the bath-room, and one of 'em followed me there and stated to me, "that you've got my clothes." I told him he was "a damn liar; go back into your room or I will shoot you." Says he, "What's that you've got in your hand?" I told him it was a revolver. "Go back into your room," and I pushed him with my hand. He started back to the room. Between the bath-room, where I was then, with his clothes in my hand, and his room, my coat, hat, and shoes laid in the hallway. The front door of this house, when I came off of the street, was wide open or was ajar, and the door of this man's room. He says it was on the knob, unfastened; but whether it was on the door knob or wide open, it makes no difference; there was no burglary committed;

it was not forced. But, anyhow, I went into his room and took his things out, and my coat, hat, and shoes lay between the bath-room and his bed-room, and in forcing him with my hand back that way (indicating) to his room I says, "Get back there to your room." He says, "What's that you got there?" I says, "A revolver. Get back there to your room," and he says, "If that's a revolver you got, I got to go back." He went back, and just then another man jumped out of the room and he grappled with me. As he grappled with me he commenced hallooing and yelling, and that time the whole hall was crowded with boarders of the house—it was
44 a sort of boarding-house or rooming-house, a sort of a hotel, on Chouteau avenue—and the policeman came up and arrested me. As far as any burglary was committed, there was no forcible entrance whatever; no door forced, either the front door—the front door was left open and the door of this man's room was open. There was no forcible entrance whatever, in any way, shape, or manner. I have offered to plead guilty in this case here, but they have indicted me for the crime that wasn't committed. I offered to plead guilty to the larceny. They indicted me for burglary in the first degree and larceny, but there was no burglary in the first degree committed, none whatever. The only crime committed in this case here, that is larceny. As to the shooting, that is a separate case entirely, on which there is a separate indictment against me.

The COURT: Just state, Mr. Moore, what you mean by finding the door ajar. State that to the jury, how you found that. You say it was ajar. Tell them what you mean by that.

WITNESS: It was unfastened; it was opened just that far (indicating); just open a little bit. I could see the light in the house through the side of the front door. I passed that way several times for weeks before that. I passed up and down there, and I noticed this place in that condition. It was more of a hotel than a residence; it is now; it ain't a private residence. This man that got shot and somebody named Love, that is not here, both roomed together, and their door, I swear, was open. He says it was closed, but wasn't fastened; but even if it was closed that makes no difference in this case here. There was no force used in entering
45 his room. There was about probably 20 boarders in that house, and those that had their doors locked wasn't bothered with; those that had their doors open and ajar, some of them was bothered with. The whole case against me here is larceny. The front door of the house was open, and is open now, I believe, unless this case that has occurred now made them more careful in closing it.

The COURT: Is that all you want to state? Anything else you think of?

WITNESS: I don't think of anything else, excepting to verify the fact that there was any burglary committed except the larceny.

The COURT: You know the circuit attorney has a right to examine you when you get through?

WITNESS: Well, he can examine me. Go ahead.

Cross-examination by Mr. ZACHRITZ:

Q. Then you don't deny the larceny?
A. No, sir.
Q. You don't deny the shooting?
A. I'm not on trial. You got a separate indictment against me for the shooting.
Q. You don't deny the larceny?
A. I don't deny the larceny; no.
Q. You are only anxious that there shall be no burglary?
A. Burglary in the first degree was not committed. There is no element of that in it.
Q. You had passed the house and noticed that the door was open?
A. Yes, sir; I had.
Q. You had gotten the lay of the land?
A. Exactly.
Q. You knew how to get into the place?
A. I knew.
46 Q. You knew there would be no difficulty in getting in?
A. No.
Q. Did you anticipate any trouble in getting out?
A. I did not.
Q. Why did you take a revolver with you?
A. I ain't on trial for the revolver case.
Q. Well, you had a revolver with you that night, had you?
(No answer).

The COURT: He stated that he had, Mr. Zachritz.
WITNESS: Sure, yes; I had a revolver with me.

By Mr. ZACHRITZ:

Q. And it was loaded?
A. Yes.
Q. And you meant when you went in there, if it was necessary, to use it, did you not?
A. No; I don't know about that.
Q. You say you don't know about that?
A. I might use it for a bluff or something.
Q. You might use it if it was necessary, and you did use it, did you not?
A. I'm not on trial for using that revolver. You've got another indictment against me for that.
Q. You won't answer that question?
A. It ain't necessary.

The COURT: The objection is sustained to that, if he objects to that.
WITNESS: I don't want to get tried for two cases.

By Mr. ZACHRITZ:

Q. You were ready and willing, if necessary, to take human life there, when committing the larceny?

A. No; I was not.

Q. You say you were not?

A. No.

Q. You did, however, try to take human life, did you not?

A. No; I did not.

47 Q. Do you say you did not?

A. I did not.

Q. You shot Stephens in the head, did you not?

A. I refuse to answer that question.

Mr. ZACHRITZ: Well, that is all. I don't care to ask you any more.

WITNESS: He was shot more by accident than anything else. It was more his own bringing on.

The COURT: Is that all that you wish to state?

WITNESS: That's all.

Here the defendant rested.

The State finally rested.

The foregoing being all the testimony in the case, the court instructed the jury as follows:

STATE OF MISSOURI }
against }
FRANK MOORE. }

The defendant stands charged by the indictment with burglary in the first degree and larceny and pleads not guilty, and the court instructs you as follows:

Under the evidence in this cause you cannot find the defendant guilty of burglary in the first degree.

The court further instructs you that if you believe and find from the evidence in the cause that the building mentioned in the indictment was the dwelling-house of S. M. Tucker on the 26th day of May, 1893, and further find that the defendant, at the city of St. Louis, on said 26th day of May, 1893, entered said dwelling-house through an open outer door and broke an inner door of said house with the intent to commit larceny therein, you will find the defendant guilty of burglary in the second degree, and unless you

48 so find you will acquit him of burglary in the second degree.

If you convict the defendant of burglary in the second degree you will assess his punishment at imprisonment in the penitentiary for any term of years not less than three years, unless you find that he was formerly convicted of grand larceny, as set out in a subsequent instruction, in which case you will assess his punishment at imprisonment in the penitentiary for life, as therein set out.

If the jury believe and find from the evidence that the defend-

ant, after entering said dwelling-house through an open outer door and breaking inner door thereof, did feloniously steal, take, and carry away therefrom the personal property mentioned in the indictment or any portion of it, and that he did so with the intent to convert the same to his, the taker's, use and make it his own, without the consent of the owner, and that the property so stolen, taken, and carried away was the property of V. T. Stephens and was of any value, you will find the defendant guilty of grand larceny and assess his punishment at imprisonment in the penitentiary, in addition to the punishment for the burglary, for a term of not less than two nor more than five years, unless you find from the evidence that defendant was formerly convicted of grand larceny, as defined in a subsequent instruction, in which — you will assess his punishment at imprisonment in the penitentiary for the term of five years.

Larceny is the felonious stealing, taking, and carrying away any money, goods, or personal property of another of some intrinsic value with the intent to deprive the owner thereof permanently.

49 Felonious means wicked and against the admonition of the law.

The mere opening of a door that is closed constitutes burglary in the second degree, as used in these instructions.

Under the evidence and the law you may acquit the defendant of both the burglary and the larceny or you may convict him of both offenses, or you may acquit him of the burglary and convict him of the larceny.

If you acquit him of the burglary, then the court instructs the jury that if they from the evidence believe and find that at the city of St. Louis, and within three years prior to the finding of this indictment, the defendant did feloniously steal, take, and carry away from V. T. Stephens the personal property mentioned in the indictment or any part thereof, of the value of thirty dollars or more, and that he did so with the intent to convert the same to his own use and deprive the owner of it, without his consent, and that the property so stolen, taken, and carried away was the property of V. T. Stephens, and was of the value of thirty dollars or more, you must find the defendant guilty of grand larceny, and unless from the evidence you so find, you must acquit the defendant of grand larceny.

If you convict the defendant of the grand larceny you will assess his punishment at imprisonment in the penitentiary for a term of not less than two nor more than five years, unless you find from the evidence that he was formerly convicted of grand larceny, as set out in a subsequent instruction, in which event you will assess his punishment at imprisonment in the penitentiary for five years.

50 As to the punishment you should assess in case you convict the defendant of either burglary or larceny, the court instructs you as follows:

If you believe and find from the evidence in the cause that the

defendant, Frank Moore, was, on the 11th day of January, 1877, in the St. Louis criminal court, convicted on his own confession of grand larceny, and, in accordance therewith, sentenced by said court to an imprisonment in the penitentiary in this State for the term of three years, and was duly imprisoned therein in accordance with said sentence, and said defendant, after his discharge from said penitentiary upon compliance with said sentence, committed the burglary in the second degree hereinbefore defined, you should assess his punishment at imprisonment in the penitentiary for life. If, however, you acquit him of burglary in the second degree and convict him of grand larceny, you will assess his punishment at imprisonment in the penitentiary for five years.

The defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf and the interest he has in this case may be considered by the jury in determining the credibility of his testimony.

The jury are the exclusive judges of the credibility of the witnesses; and if you believe and find from the evidence that any witness has wilfully testified falsely to any material fact in the case, you are at liberty to disregard the whole or any portion of such testimony.

The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by proof which establishes his guilt to your satisfaction and beyond a reasonable doubt, and the burden of proving his guilt rests with the State.

51 If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict.

If of his guilt you are not convinced beyond a reasonable doubt, your duty is to acquit; but to justify an acquittal on the ground of doubt alone, it should be reasonable and substantial and not a mere guess or conjecture of the possibility of innocence.

To the giving of which instructions defendant at the time duly excepted.

The cause having been argued by defendant, the circuit attorney, in his closing argument, said: "Moore is shrewd, and hopes by a mere technicality to save himself from the heavier sentence—from the *sevier* penalty—for burglary by getting upon the stand and, with dare-devil effrontery, makes a special plea as to larceny; tells the jury how he found the door open; how he went upstairs to rob hard-working citizens of their hard earnings, who were at that hour of the night or morning sleeping peacefully and unsuspicious of the presence of a burglar bent on pillage, and, if necessary, murder. He says he found the door open. Of course, he will say that or anything that will save him, now that justice has him in hand, but Mr. Stephens is a reputable citizen, says and positively swears it, that he had closed his door. Is it necessary to ask whose word you will take—Moore's, who is a self-confessed thief, or the word of Mr. Stephens? It is not necessary to constitute burglary, 2nd degree, that the door should be locked or bolted. It is sufficient if the door be closed and the knob be turned, and

the door opened and entry made into an inner room with
52 felonious intent. He undertakes to impress on your minds as a fact that his only offense is larceny. He hopes to get off thereby with a five-year sentence, which in this State would release him at the expiration of three years and nine months. Gentlemen, are you willing that this desperate criminal shall again be turned loose on the community at the expiration of three years and nine months, to again maraud, harass, and rob peaceful and law-abiding citizens and to, if he finds it necessary for his own safety and escape, shoot them down? Would a sentence of three years and nine months to this red-handed burglar, this midnight assassin, be considered just by your fellow-citizen, Mr. Stephens, the victim of a bullet fired by the murderous arm of Moore, and who now at this moment carries a bullet in his brain as a reminder of that struggle in the dark? Gentlemen, you will be unjust to Mr. Stephens, you will be unjust to yourselves, you will be unjust to the State if you fall short in giving this desperate criminal the full extent of the law and place him for his natural life *when* he can no more awake the silent hours of night with his murderous revolver."

To which conduct of the circuit attorney defendant at the time excepted.

The jury returned the verdict which is fully set out on page 6 of this record.

And on November 13th, 1893, within four days from the rendition of the verdict, defendant filed the following motion for a new trial:

53 In the St. Louis Criminal Court, November Term, 1893.

STATE OF MISSOURI)
vs.
FRANK MOORE.)

Now comes the defendant in the above-entitled cause and moves the court to set aside the verdict heretofore rendered and grant a new trial in said cause for the following reasons:

1st. Because the court erred in overruling defendant's motion to quash the indictment for the reason that it violated both the State and Federal Constitutions.

2nd. Because the court erred in refusing to quash the indictment upon the ground of duplicity.

3rd. Because the court erred in admitting incompetent and irrelevant evidence introduced by the State after the court had assured defendant that the court would protect the rights and interests of defendant and see to it that the State took no unfair advantage of defendant in the trial.

4th. Because the court erred in proceeding with the trial after defendant had in the presence of the jury charged the honorable judge of this court with being so biased and prejudiced against defendant that he could not give defendant a fair and impartial trial.

5th. Because the court had no jurisdiction to try defendant after defendant had charged the court with being so prejudiced against him that he would not afford him a fair and impartial trial.

6th. Because the court erred in forcing defendant to trial
54 without the defendant having an attorney to assist counsel and advise defendant and try the case for him.

7th. Because the court erred in forcing defendant to trial without the presence of defendant's witnesses, who defendant had used due diligence to have present.

8th. Because the court erred in its instructions given to the jury of its own motion.

9th. Because the court erred in failing to fully and properly instruct the jury upon the law applicable to the case.

10th. Because the evidence adduced failed to support the allegations of the indictment, and the court should have instructed the jury to acquit defendant.

11th. Because the court erred in permitting the circuit attorney to make improper remarks to the jury when, under the circumstances, it was the duty of the court to protect defendant against such injury.

12th. Because the verdict is against the evidence and the weight of evidence and is against the law of the case.

FRANK MOORE,
By CHARLES T. NOLAN,
His Attorney.

And the court gave defendant until the 17th day of November, 1893, to file affidavits in support of said motion for a new trial.

On the 17th day of November — filed the following affidavit in support of motion for new trial:

Frank Moore, of lawful age, being duly sworn, upon his oath says: I am the defendant in this case. Some time ago—I forget the exact date—the court appointed Joseph Furling as my attorney in this case. I had no money at that time with which to
55 employ an attorney and hence relied on the said Joseph Furling to act as my attorney and have my case prepared for trial by having the witnesses subpœnaed. Mr. Furling, on calling me up to the "screen" in the jail in the early part of October (I cannot recall the exact date), remarked, "Frank, things look rather dark in your case." "How is that?" Mr. Zachritz won't consent to a plea for less than seven years—five on the burglary and two on the assault-to-kill case." Why, I might as well take my chances with a jury as to accept such a plea as that. The only verdict possible in the burglary case is for larceny. Of course, I'll get the extent. What I am most afraid of is the assault-to-kill case." "Well, that is the way things are now. Perhaps after awhile I can get a more favorable offer from him; but it looks as though we would have to go to trial." "In case I do have to go to trial — some of the men who were boarding at that house subpœnaed as witnesses—some two or three who are unbiased—that is, who did

not lose anything that night. "What do you want them for?" "To verify the fact that the door of the house was always left open." "What are their names?" "I don't know." "Well, I'll drop in there some day when I am not busy, and make enquiries and get the names of some of them for you." On the date my case was to have been called the "Daly murder case" was on trial. Mr. Furling replied to my query as to what was done in my case, "Continued till further notice." I received no further notice of the case until about 10 a. m. of the 9th of November, the day of the trial. On that occasion one of the jail guard- informed me that I was on the list to go to court. Shortly afterwards Mr. Furling called on me at the "screen" and
56 informed me that they were going to put the case on trial. I asked him "if he had subpœnaed those witnesses, as I requested." "No; I did not think it advisable." "What is the use of bringing them there and taking the chances of making the case worse." "I want them there; I will surely find some of them honest and disinterested enough to speak the truth, in which event it will be shown that there was no burglary committed." "What are their names?" "I do not know; I thought you were going to inquire." "Well, we'll see what we can do when we get upstairs." When placed before the bar I again objected to going into trial without the presence in court of said witnesses. Mr. Furling consulted with the honorable court; I did not hear what was said. Returning to where I sat, he again enquired as to the names of any of the boarders. I replied, "I do not know the names of a single one of them." "Well, I'll proceed to pick the jury, and in the interval will endeavor to have some of them subpœnaed." "I do not want to go to trial before Judge Edmunds; he evidently is prejudiced; if I have to get tried now, let it be before some other judge." "Can you get t-o reputable citizens to swear to the fact that he is prejudiced?" "You know I am tied, hands and feet, and can get no one to do anything for me." Mr. Furling then consulted in a low tone with the honorable court; I could not hear what was said. On returning to where I was seated Mr. Furling again put the question, "Can you get t-o reputable citizens to swear that Judge Edmunds is prejudiced?" "No." "Well, we'll have to go on with the case; he says he is not prejudiced." "Ask him if I can speak to him myself." He did so. I was permitted to speak to
57 the honorable court and said: "It is not fair to put me into trial without the presence of some of those boarders who are disinterested, who did not lose anything." "What are their names?" "I do not know, sir. I did not expect to be forced into a trial. I have been willing all along to plead guilty to larceny and accept the extent on that plea, but I cannot plead guilty to a crime which has not been committed." "The court does not know that any crime has been committed." "Why do you refuse to accept my plea?" "The court will not accept your plea and have you name the sentence." "Understand I am not prejudiced; I have spoken to no one on the subject." "Not to Chief Harrigan?" "Take your seat, sir." On taking my seat Mr. Furling said something; I do

not know what. I replied in perhaps a surly manner, "Oh, to hell with the whole case. I am already tried and convicted here. This is a kangaroo trial." Mr. Furling replied, "Look here, Moore, I do not want any one to get the worst of it on my account. I shall withdraw from the case." I replied not. He arose, stepped over to the railing, and, addressing the court, requested to be permitted to withdraw from the case; request was granted. The honorable court then asked me, "Do you wish that the court appoint you an attorney?" I replied, "No; you would excuse yourself from trying this case if you were honest." The court then said, "I will see that you are fairly tried, Mr. Moore, and that no illegal evidence is admitted against you." The jurors were then called and the trial commenced. Commenting on the testimony given by defendant in his own behalf, Mr. Zachritz said, in addressing the jury: "Moore is shrewd, and hopes by a mere technicality to save himself from the heavier sentence—from the severer penalty—for burglary by get-
58 ting up on the stand and, with dare-devil effrontery, makes a special plea as to larceny; tells this jury how he found the door open; how he went upstairs to rob hard-working citizens of their hard earnings, who were at that hour of the night or morning sleeping peacefully and unsuspicious of the presence of a burglar bent on pillage, and, if necessary, murder. He says he found the door open. Of course, he will say that or anything which will save him, now that justice has him in hand; but Mr. Stephens, a reputable citizen, says, and positively swears to it, that he had closed his door. Is it necessary to ask whose word you will take—Moore, who is a self-confessed thief, or the word of Mr. Stephens? It is not necessary to bolt and lock a door on retiring; it is not necessary to force an entrance into a sleeping apartment to constitute burglary. The mere fact of entering with felonious intent is sufficient. He undertakes to impress on your minds as a fact that his only offense is larceny. He hopes to get off with a five years' sentence, which in this State would release him at the expiration of three years and nine months. Gentlemen, are you willing that this desperate criminal shall again be turned loose on the community at the expiration of three years and nine months to again maraud, harass, and rob peaceful and law-abiding citizens and to, if he finds it necessary for his own safety and escape, shoot them down? Would a sentence of three years and nine months to this red-handed burglar, this midnight assassin, be considered just by your fellow-citizen, Mr. Stephens, the victim of a bullet fired — the murderous arm of Moore, and who now at this moment carries a bullet in his brain as a reminder of that scuffle in the dark?

"Gentlemen, you will be unjust to Mr. Stephens, you will
59 be unjust to yourselves, you will be unjust to the State if you fall short in giving this desperate criminal the full extent of the law and place him for his natural life where he can no more awake the silent hours of the night with his murderous revolver."

FRANK MOORE. [SEAL.]

Sworn to and subscribed before me this 17th day of November, A. D. 1893.

HUGH T. PATTISON,
Clerk St. Louis Criminal Court.

On the 11th day of December, 1893, the court overruled defendant's motion for a new trial; to which action of the court defendant at the time excepted.

And on the 11th day of December, 1893, within four days from the day on which defendant's motion for a new trial was overruled by the court, defendant filed the following motion in arrest of judgment:

In the St. Louis Criminal Court, November Term, 1893.

STATE OF MISSOURI)
vs.)
FRANK MOORE.)

Now comes the above-named defendant, after having filed heretofore a motion for a new trial, and moves the court to arrest the judgment in said cause for the following reasons:

Because the verdict is insufficient in law to sustain a judgment.

Because the indictment is insufficient to sustain a judgment, for the reasons that it is bad for duplicity, charges more than
60 — offense in a single count.

Because the verdict is guilty of burglary in the second degree, when the indictment charges burglary in the first degree, and burglary in the second degree is not a lesser offense than burglary in the first degree and included in it, but is a separate and distinct offense, differing in its elements from burglary in the first degree.

Because the statute upon which the indictment is founded is unconstitutional and void, in that it violates the 14th amendment of the Federal Constitution, and violates the "bill of rights" in the constitution of Missouri in prescribing a second punishment for the same offense, and different punishment for different persons for committing the same offense.

Because the indictment in charging a former conviction of another separate and dist*nce* offense attacked defendant's character without its having been put in issue by defendant.

Because the indictment failed to properly and clearly inform defendant of the nature and causes of the accusation against him.

FRANK MOORE,
By CHARLES T. NOLAN,
His Attorney.

And on the same day, to wit, the 11th day of December, 1893, the court overruled defendant's motion in arrest of judgment; to which ruling an- action of the court defendant at the time duly excepted.

On the 19th of December, 1893, defendant prayed for an ap-

peal to the supreme court of Missouri; which appeal was by the court allowed on the 19th day of December, 1893.

On the 22nd day of December, 1893, defendant presents this as his bill of exceptions and prays the court to sign and seal the same and make it a part of the record, which is done accordingly this
61 22nd day of December, 1893.

HENRY L. EDMUNDS, [SEAL.]
Judge St. Louis Criminal Court.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Hugh T. Pattison, clerk of the St. Louis criminal court, certify that the above and foregoing is a full, true, and complete transcript of the record in the cause of The State of Missouri, plaintiff, *vs.* Frank Moore, defendant, as fully as the same appears of record and on file in my office.

Witness my hand and the seal of said court, hereto affixed, at office, in the city of St. Louis, this 3rd day of January, A. D. 1894.

[SEAL.] HUGH. T. PATTISON,
Clerk of the St. Louis Criminal Court.

Upon inspection of record it is ordered the judgment be superseded until hearing by this court.

J. B. GANTT, *Judge.*

And afterwards, to wit, on the 6th day of January, 1894, the said appellant files his motion and affidavit to prosecute his appeal herein as a poor person; which said motion and affidavit are in words and figures as follows, viz:

In the Supreme Court of Mo., Oct. Term, 1893, Division No. 2.

62 THE STATE OF MISSOURI, Pl'ff, }
vs.
FRANK MOORE, Def't. }

Now comes def't in the above cause and moves the court to grant him permission to sue as a poor person, and herewith files his affidavit in support of said motion.

J. W. ZEVELY,
Att'y for Def't.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Frank Moore, of lawful age, being duly sworn, upon his oath says that he is defendant in a case appealed from the St. Louis criminal court to the supreme court of Missouri, having been convicted, under the habitual-criminal act, of burglary in the second degree and sentenced to life imprisonment in the penitentiary.

That he is now confined in the St. Louis jail, and has been since his arrest, upon the above-named charge.

Affiant states further that he is totally insolvent and has no property or money whatever. That he had no money to employ counsel to defend him at his trial, and hence went to trial without an attorney.

That after his conviction a friend generously gave him a small sum of money to employ an attorney to argue a motion for a new trial, and if that motion was overruled to perfect an appeal to the supreme court by getting up a proper bill of exceptions.

Affiant states that he paid this money to an attorney, and that attorney did all he agreed to do for the money paid him, and
63 affiant now is wholly unable to pay the docket fee of $10.00 required by the supreme court, and respectfully asks the honorable judges of the supreme court to permit him to prosecute his appeal as a poor person.

Affiant further states that he believed if he perfected his appeal to the supreme court that the errors committed at the trial would be readily seen by the supreme court, whether affiant had an attorney or not, and unless he receives some further gift of money he will be unable to employ an attorney to represent him in the supreme court.

Affiant states that — are many manifest errors in the record which he now seeks to file, and unless the supreme court permits him to sue as a poor person great injustice will be done to him.

Affiant further states that he has no relatives or friends to rely upon for financial assistance, and has no means whatever of raising ten dollars with which to pay the supreme court docket fee.

Wherefore affiant prays to be permitted to prosecute his appeal as a poor person. FRANK MOORE.

Subscribed and sworn to before me this 5th day of January, A. D. 1894.

HUGH T. PATTISON, [SEAL.]
Clerk St. Louis Criminal Court.

And on said 6th day of January, 1894, the following proceedings were had in said cause, viz:

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

64 Comes now the appellant, by attorney, and files his affidavit and motion to prosecute the appeal herein as a poor person, which being seen by the court, it is ordered that said motion be, and the same is hereby, sustained. Thereupon comes the said appellant, by attorney, before Hon. Jas. B. Gantt, in chambers, and presents his application for a supersedeas herein, which being seen and heard, it is ordered that, upon an inspection of the record, the judgment be superseded until hearing by this court.

And afterwards, to wit, on the 10th day of April, 1894, the further following proceedings were had in said cause, viz:

* * * * * * *

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

Come now the said parties, by attorneys, and submit these causes to the court on briefs; and, upon motion, it is ordered by the court that the said appellants be granted 10 days in which to file briefs.

And afterwards, to wit, on the 8th day of May, 1894, the further following proceedings were had in said cause, viz:

* * * * * * *

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

Come now the said appellants and file *their* motions to set aside the submission of these causes heretofore entered and to reset said causes for argument or for leave to file briefs herein, which being seen and heard by the court, it is ordered that said motions be, and the same are hereby, denied.

Which said motion is in words and figures as follows, to wit:

65 In the Supreme Court of Missouri, April Term, 1894.

STATE OF MISSOURI, Resp.,
vs.
FRANK MOORE, App.

Now comes appellant and moves the court to reset said cause for argument, at as early date as is convenient to the court, for the following reasons:

Because on April 11th, the day originally set, the attorney for appellant, Charles T. Noland, was sick and unable to come to Jefferson City and argue said cause, and has been too ill to complete and file a brief within ten days from that date, and for a week prior to April 11th he was also ill.

And if this request is denied and the court refuses to permit an oral argument, then appellant respectfully prays that he be allowed three days within which to file a brief, already prepared and ready to be printed. Appellant most respectfully represents that he, Frank Moore, has a meritorious appeal.

FRANK MOORE,
By CHARLES T. NOLAND,
Att'y for Appellant.

STATE OF MISSOURI, } *ss:*
County of Cole, }

Charles T. Noland, being duly sworn, upon his oath says that he has been guilty of no negligence to his client or want of respect to this honorable court, but that by sickness, lasting over three weeks,

he was totally unable to come to Jefferson City and argue the
66 cause on April 11th, and so had this court informed at the time by a letter written by his brother, H. P. Noland.

He further says that he now has prepared a brief, which he will have printed if this court will permit it to be filed.

He further says that the matters and facts stated above are true, and that if this court will examine his brief or permit an oral argument, then the cause will be reversed.

That appellant is now under a sentence of life imprisonment, and a great injustice may possibly be done if his appeal is not heard.

CHARLES T. NOLAND.

Subscribed and sworn to before me this 5th day of May, 1894.

JNO. R. GREEN, *Clerk*.

And on the 8th day of May, 1894, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, Respondent, } Appeal from St. Louis
vs. Criminal Court.
FRANK MOORE, Appellant. }

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid by the said St. Louis criminal court rendered, be in all things affirmed and stand
67 in full force and effect, and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution; and it is further considered and adjudged by the court that the sentence pronounced against the said Frank Moore, appellant herein, by the said St. Louis criminal court be in all things executed, and that the marshal of this court arrest the said Frank Moore without delay, wherever he may be found in this State, and transport him to the State penitentiary of the State of Missouri, at the city of Jefferson, in said State, and deliver him to the warden thereof, there to be imprisoned for the term of his natural life, the same being the sentence passed by the said St. Louis criminal court aforesaid; and it is further ordered by the court that the marshal of this court be authorized to appoint one guard to assist him in making the arrest and in transporting said Moore as aforesaid. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

68 In the Supreme Court of Missouri, Division No. 2, April Term, 1894.

STATE OF MISSOURI, Respondent, }
vs.
FRANK MOORE, Appellant. }

Defendant was indicted in the St. Louis criminal court for burglary in the first degree and larceny in a dwelling-house. The in-

dictment charged that defendant "on the 11th day of January, A. D. 1877, at the city of St. Louis, in the St. Louis criminal court, was duly convicted, on his own confession, of the offence of grand larceny, and in accordance with said confession was duly sentenced by said court to imprisonment in the penitentiary for the term of three years, and was duly imprisoned in said penitentiary in accordance with said sentence; and that the said Frank Moore, after his discharge from said penitentiary upon compliance with said sentence, to wit, on the 26th day of May, A. D. 1893, etc., did commit the said offences of burglary and larceny. Defendant was arraigned at July term, 1893, and pleaded not guilty.

At the November term following, defendant withdrew his plea of not guilty and filed his motion to quash the indictment, which being overruled, he was again arraigned, pleaded not guilty, was put upon his trial, which resulted in his conviction of burglary in the second degree and his punishment being fixed at imprisonment in the penitentiary for life. From the judgment and sentence he appeals.

The evidence showed that defendant had been convicted on his plea of guilty in open court of grand larceny, for which he had been sentenced to and had served a term in the Missouri penitentiary;

69 that afterwards, on the night of the 26th day of May, 1893, he had entered into the dwelling-house of one S. M. Tucker, in the city of St. Louis, through the outer door, which does not appear to have been closed, then into the room occupied by one Mr. Stephens and another by raising the latch or turning the knob on and opening the door which led therein and which was closed; that he took and stole from Stephens about $34 in money and a watch worth $45. The watch was found upon defendant's person when he was arrested; the money he admitted to have thrown away. He was discovered, when making his exit from Stephens' room, by a Mr. Love who was occupying the room with Stephens. Stephens followed him out into the hallway and while attempting to restrain him was shot in the face by defendant with a pistol which defendant had in his hand. Stephens and Love got him down, however, and held him until a policeman came and took him into custody. On the trial he admitted the larceny, but denied the burglary. No brief has been filed in his behalf.

In the motion to quash the indictment, the contention is that the indictment is bad, first, because in violation of both the State and Federal Constitutions; second, that it is bad because of duplicity. It is difficult to conjecture wherein or in what manner the statute, sec. 3959 R. S., imposing a greater punishment for a second criminal offence, is in violation of the Constitution, either as putting a person twice in jeopardy or as prescribing different punishments for different persons committing the same offence. The clauses of the Constitution of the United States which we suppose it was contended were violated are those which provide, 1st, that "nor shall any

70 person be subject for the same offense to be twice put in jeopardy of life or limb, and, 2nd, no cruel and unusual punishment inflicted."

In a case similar to the one in hand and under a similar statute it was held (People *vs.* Stanley, 47 Cal., 113) that because the punishment for the second offense being increased because of a prior conviction for another offense, the accused is not punished twice for the same offense; that he is not again punished for the first offense, "but the punishment for the second is increased because by his persistence in the perpetration of crime he has evinced a depravity which merits a greater punishment and needs to be restrained by severer penalties than if it were his first offense."

In Virginia, under a similar statute, also, in Rand *vs.* Commonwealth (9 Gratten, 473), the court says: "No constitutional or other obstacle, however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offenses committed after the passage of the act may, if shown to have committed like offenses before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. One convicted under such a statute cannot justly complain that his former transactions have been brought up in judgment against him. He knew or is presumed to have known before the commission of the second offence all the penalties denounced against it, and if in some sense the additional may be said to be a consequence of the first offense (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence but one which could only arise
71 on the conviction of the second offense, and one, therefore, which, beings fully apprised of in advance, the offender was left free to brave or avoid."

In Massachusetts a similar statute has been enacted, and in Ross case, 2 Pick., 170, the court says: "The statute provides that if any person having been before convicted of larceny shall afterwards commit another larceny, he shall be punished more severely *than* if he had not previously committed the like offense. The punishment is inhanced from the character of the culprit. So the same statute provides that if a person shall be convicted at the same term of three distinct offenses, he shall receive a more severe punishment. The same objection would apply in these cases, as much as in the one under consideration, that the culprit was punished because he had committed prior offenses, and that he was punished anew for these offenses; but in our view the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." The same views are expressed in Plumby *vs.* Commonwealth, 2 Metc., 413; Ingalls *vs.* State, 48 Wis., 647; Maguire *vs.* State of Maryland, 47 Md., 485.

The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime, and we are unable to see how the statute

which imposes such increased punishment violates the provisions of our constitution here-before quoted. We are not inclined to think the punishment imposed for the second offense of a
72 crime of so grave a character either cruel unusual.

Nor are we inclined to hold the indictment bad for duplicity. Sec. 3529, R. S., especially provides that the offenses of larceny and burglary may properly be charged in the same count.

The fact that the indictment charged a former conviction of another and entirely different offense is not in fact charging him with an offense with respect of the former offense in the case in hand. The averments as to the former offense go as to the punishment only. In Reg *vs.* Clark *et al.*, 6 Cox Crim. Cas., 210, it is held that several previous convictions may be lawfully set out in the indictment when the object in setting them out is only to justify a severer punishment. We must therefore hold that the objections to the indictment are not well taken. See also State *v.* Austin, 113 Mo., 538.

There does not seem to have been any incompetent or irrelevant testimony introduced by the State, as aver-ed by defendant in his motion for a new trial, nor is there anything in the record which shows that the defendant, "in the presence of the jury, charged the court with being prejudiced against him." But, even if there was, the judge was not disqualified from proceeding with the trial of the cause by reason of such statements. The only way by which a judge may be disqualified from sitting in the trial of a cause is by the reasons of the existence of some one or more of the causes mentioned by sec. 4174, R. S. 1889, and by a compliance with its provisions.

The sixth ground assigned by defendant why a new trial should be granted him is that the court forced him to trial without his having an attorney to assist and defend him against the charges
73 in the indictment. This assignment is not sustained by the record, which shows that the court offered and insisted upon assigning counsel for defendant, but that he refused to permit it to be done or to accept the services of an attorney thus assigned. While sec. 4140, R. S., requires the court to appoint counsel for any person about to be arraigned upon an indictment for a felony, at his request, when he is without counsel to conduct his defense and be unable to employ any, it is no part of his duty to force the services or presence of counsel on any person under indictment for crime who does not desire them and who, as the defendant did in this case, refuses to accept them.

Defendant also claims that he was forced to trial without the presence of his witnesses. His affidavit, as copied into the record, avers that he desired witnesses to prove that the front door to the dwelling-house through which he entered was always left open at night. There was no pretense or claim on the part of the State that this door was closed at the time of the burglary, and the court instructed the jury that there was no evidence of the breaking of the outer door, and it is not probable that the defendant could have been prejudiced by the absence of witnesses by whom he expected to

prove facts that were wholly immaterial and that there was no claim upon the part of the State did not exist.

The instructions covered every phase of the case and were quite fair to the defendant. After a careful examination of them we have been unable to see any objection to them, nor has any objection other than that which is general been suggested in the motion for a new trial.

There is no merit in the objection made to the remarks of the prosecuting attorney, as they were warranted by the facts in
74 the case as disclosed by the evidence, which showed defendant's guilt beyond any reasonable doubt. There does not seem to be any error in the record which would justify a reversal of the judgment, and it should be affirmed. It is so ordered. All of this division concur.

G. D. BURGESS, *J.*

75 And afterwards, to wit, on the 10th day of May, 1894, the further following proceedings were had in said cause, viz:

* * * * * * *

STATE OF MO., Resp.,)
v.)
FRANK MOORE, App.)

Come now the said respondents, by attorney, and file *their* motions for rehearings herein.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 2, April Term, 1894.

THE STATE OF MISSOURI, Respondent,)
vs.) No. 6961.
FRANK MOORE, Appellant.)

Now comes the above-named appellant and moves the court to set aside its judgment affirming the judgment of the St. Louis criminal court, and to grant a rehearing of said cause for the following reasons, to wit: Because the decision in said cause is in conflict with the case of The State *vs.* Austin, 113 Mo., 538, as appears in the brief herewith attached and made a part of this motion, and the authorities therein cited, but which brief has not been considered by this court by reason of the — counsel for appellant and his inability to file his brief within the time prescribed by this court; and for the further reason that this record shows that the accused was acquitted by the jury on all and every charge against him in the indictment, and yet stands sentenced to the penitentiary for life for an offense not named in the indictment, nor included in any offense described therein, and thus is deprived of his consti-
76 tutional right of being prosecuted under an indictment informing him of the nature and cause of the accusation against

him. This appears of record, and this honorable court, in its decision, has entirely overlooked said point.

It is respectfully submitted to the court that great injustice will be done the appellant unless his appeal is heard and the brief herewith attached and made a part of this motion is examined and passed upon by this honorable court.

In the criminal court a constitutional question was raised upon a motion to quash the indictment, and the point was renewed in the motion for a new trial and the motion in arrest of judgment, as is fully shown by the record, and it is respectfully moved that this motion and cause be transferred to the court en banc.

Respectfully submitted.

CHARLES T. NOLAND,
Att'y for Appellant.

And afterwards, to wit, on the 24th day of May, 1894, the further following proceedings were had in said cause, viz:

* * * * * * *

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

* * * * * * *

Now, at this day, the court, having fully considered and understood the motions heretofore filed for rehearings herein, doth order that said motions be, and the same *are* hereby, denied.

And afterwards, to wit, on the 28th day of May, 1894, the further following proceedings were had in said cause, viz:

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

Comes now the appellant, by attorney, and files his motion
77 to transfer this cause from division No. 2 to this court.

Which said motion is in words and figures as follows, to wit:

78 In the Supreme Court of Missouri, Sitting in Banc, April Term, 1894.

STATE OF MISSOURI, Respondent,
vs.
FRANK MOORE, Appellant.

Now comes the appellant in the above-entitled cause and moves the court to set aside the decision of division No. 2 of this court, affirming the judgment of the St. Louis criminal court, by which appellant was sentenced to imprisonment in the penitentiary for life, and to order the said division No. 2 to transfer said cause to the

supreme court of Missouri, sitting in banc, for the reason that said cause involves a Federal question.

In support of this motion it is respectfully shown to the court that the record discloses that several Federal questions are involved, as follows: 1st, by motions to quash the indictment, a new trial, and in arrest of judgment, the Federal question was raised that the statute on which the indictment was founded, known as the "habitual criminal act," provided a second punishment for one offense; provided a cru*a*l and unus-al punishment; was unequal in its operations, and denied to appellant the equal protection of the law, in this, that it violated the rule laid laid down by the Supreme Court of the United States in Mo. *vs.* Hays; that the test is, "Does the law apply to all alike in the same territory?"

Division No. 2 in its opinion decides that the statute does not violate either Federal or State Constitution by providing a second punishment for the same offense, nor does it provide a cruel and unusual punishment; but the opinion fails to pass on the question of its being unequal in its operation, thus denying to some
79 certain persons the equal protection of the law. 2nd, the princip*le* and unanswerable Federal question is as follows: Appellant stands sentenced to imprisonment in the pen-tentiary for life for a crime he was never indicted for, and stands acquitted for all he was charged with in the indictment on which he was tried. "Due process of law" in Missouri, and also under the Federal Constitution, requires that no person shall be proceeded against for a felony except by indictment. Thus to convict and sentence appellant upon a felony never charged against him in any way is a deprivation of his liberty without due process of law.

The indictment charges burglary in the first degree. Appellant was acquitted of that charge, but was convicted of burglary in the second degree under section 3523, because the evidence showed him guilty of that offense. The evidence also showed him guilty of assault with intent to kill, and he might as well have been convicted of that felony as the one he was convicted of.

A moment's glance at sec. 3523 will convince the court that the elements composing that felony are not the same and do not form a component part of burg*u*lary in the first degree.

The fact that the felony described in sec. 3523 is called burg*u*lary in the second degree is of no importance.

It might as well have been called felonious breaking or nighttime trespass, or any other name.

There are four different felonies called burg*u*lary in the second degree, each described under a separate section of the statute, just as there are different felonies called manslaughter and larcenies — statutory and common law.

This point was clearly and fully stated in the motion in
80 arrest of judgment; but division No. 2 in its opinion did not pass on it. The point was overlooked.

Appellant filed no brief before division No. 2 for the reason that when the case was called the attorney for appellant was sick, and by letter notified the court and asked that the case be placed at

the foot of the call. This the division No. 2 refused to do, but took the cause, as submitted on briefs, and gave appellant ten days to file a brief.

Appellant's attorney was ignorant of the rule of this court which requires all applications for an extension of time to file briefs to be accompanied by affidavit, and hence relied on his simple notification to the court of his illness.

After the time had elapsed for filing a brief appellant's attorney filed an affidavit setting forth his continued illness, and asked leave to file a brief already prepared, but this was also denied; hence the points covered in the opinion are those, simply those, which the judge writing the opinion saw fit to discuss while complying with the statute requiring an examination of the record.

It is respectfully insisted that this court has recognized the distinction now contended for as to the difference in elements of burglary and rob-ery in the first degree and second degree. Notably in—

State *vs.* Alexander, 56 Mo., 131.
State *vs.* Jenkins, 36 Mo., 372.
State *vs.* Davidson, 38 Mo., 374.
State *vs.* Brannan, 55 Mo., 63.
State *vs.* Harmon, 106 Mo., 635.
State *vs.* Gabriel, 88 Mo., 631.
State *vs.* Arter, 65 Mo., 553.
81 State *vs.* Stone, 68 Mo., 101.
State *vs.* Kneeland, 90 Mo., 337.

And in State *vs.* Frank, 103 Mo., 120, the statute, sec. 3950, in regard to convictions for a lesser degree when a higher degree is charged, is fully discussed and construed, and held that they apply only to those offences which are necessarily included in and form a part of the offence charged in the indictment.

The above decisions and sec. 3950 of the statutes and art. 2, sec. 12 and 22, clearly settle that due process of law in Missouri requires that a person shall be informed by indictment of the charge upon which a conviction can be founded.

A denial of this right is a clear violation of the 4th amendment to the Federal Constitution.

The record shows that these questions are involved, that they were raised in the trial court, and that division No. 2 passes upon some of them.

Under the decision of this court in State *vs.* Sam'l Welsor, not yet reported, upon a similar motion to this one, it was held that no matter whether the Federal question involved had merit or not, the cause should be transferred to the court in banc.

In so holding, this court but followed the logic of its decisions in—

State *ex rel.* Campbell *vs.* St. Louis Court of Appeals, 97 Mo., 276.
State *ex rel.* Blakemore *vs.* Rombauer, 101 Mo., 499.
State *ex rel.* Rogers *vs.* Rombauer, 105 Mo., 103.
State *ex rel.* Dugan *vs.* Kansas City Court of Appeals, 195 Mo., 299.

82 A motion was made in division No. 2 to transfer this cause to the court in banc, but the motion was denied, although the opinion in the case decided that the Federal question was not violated. Surely a Federal question is involved if, upon an inspection of the record as required by law, the court decides a a Federal question.

While the Federal question decided by the court against appellant clearly entitles him to a transfer to the court in banc, yet he is doubly entitled to it when the other Federal question not touched in the opinion of the court is considered and it is seen that appellant is now in the penitentiary upon a life sentence for a felony he was never indicted for, while an indictment for assault to kill is still pending in St. Louis.

Respectfully submitted.

CHAS. T. NOLAND.
Att'y for Appellant.

And afterwards, to wit, on the 4th day of June, 1894, the following further proceedings were had in said cause, viz:

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to transfer this cause from division No. 2 to court in banc, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 14th day of June, 1894, the further following proceedings were had in said cause, viz:

83 STATE OF MO., Resp.,
v.
FRANK MOORE, App.

Comes now the said appellant, by attorney, and files his motion to set aside the order heretofore made overruling the motion to transfer this cause from division No. 2 to court in banc.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Sitting in Banc, April Term, 1894.

STATE OF MISSOURI, Respondent,
vs.
FRANK MOORE, Appellant.

Now comes the above-named appellant and moves the court to set aside its order overruling appellant's motion to order division No. 2 to transfer the above-styled cause to the court in banc for the following reasons:

Because said decision is in conflict with the provision in the amendment to the constitution of Missouri in regard to a transfer

of a cause from a division of this court to the court in banc when a Federal question is involved, and is in conflict with the decision of the court in banc in State *vs.* Sam'l Welsor (not yet reported), the only case wherein the court in banc has been asked to order a division to transfer a cause to the court in banc after that division has refused to transfer such cause, and is in conflict with the principles of law declared in—

State *ex rel.* Dugan *vs.* Kansas City Court of Appeals, 105 Mo., 299;
State *ex rel.* Blakemore *vs.* Rombauer, 101 Mo., 499;
State *ex rel.* Rogers *vs.* Rombauer, 105 Mo., 103;

84 in which cases the constitutional provision as to the transfer of causes from the courts of appeal to the supreme court when a constitutional question is involved, and is in conflict with the following cases which recognize the distinctions between the elements composing burglary and robbery in the first degree and those composing the offence called for convenience burglary or robbery in the second degree.

State *vs.* Alexander, 56 Mo., 131.
State *vs.* Jenkins, 36 Mo., 372.
State *vs.* Davidson, 38 Mo., 374.
State *vs.* Branson, 55 Mo., 63.
State *vs.* Warren Pitts, 57 Mo., 85.
State *vs.* Kneeland, 90 Mo., 337.

Sec. 3950, providing for convictions of a lessor degree of an offence when the greater degree is charged in the indictment, does not apply, because this court has ruled that such provision only applies to offences of which the elements composing it are necessarily included in and form a part of the greater offense.

The record in this case shows that appellant is now confined in the penitentiary upon a life sentence upon a crime he never was indicted for—burglary in the 2nd degree—and which is not included in the crime charged in the indictment, and is therefore imprisoned without "due process of law," as is declared and guaranteed under the constitutions of Missouri and the United States.

CHARLES T. NOLAND,
Att'y for Appellant.

85 And afterwards, to wit, on the 25th day of June, 1894, the further following proceedings were had in said cause, viz:

STATE OF MO., Resp.,)
v.
FRANK MOORE, App.)

Now, at this day, the court, having fully considered and understood the motion heretofore filed to set aside the order overruling the motion to transfer this cause to the court in banc, doth order that said motion be, and the same is hereby, overruled.

And afterward, to wit, on the 30th day of June, 1894, the further following proceedings were had in said cause, viz:

STATE OF MO., Resp.,
v.
FRANK MOORE, App.

Comes now the said appellant, by attorney, and files his application for an appeal to the Supreme Court of the United States.

Which said motion is in words and figures as follows, to wit:

86 In the Supreme Court of Missouri, April Term, 1894.

THE STATE OF MISSOURI, Respondent, *vs.* FRANK MOORE, Appellant. } Motion for an Appeal to the Supreme Court of the United States.

Now comes the above-named appellant in the above-styled cause and moves this honorable court to grant him an appeal in said cause to the Supreme Court of the United States, and in support of his motion appellant most respectfully represents and shows that the following Federal questions were raised and involved in said cause, as appears from the record now on file in this court:

First. The statute, sec. 3959, upon which the indictment was based, violates the fourteenth (14th) amendment to the Constitution of the United States, in this: 1st. It is unequal in its operation, by providing different punishments for those who have formerly been convicted of some offense than for citizens not so convicted. It is not a provision for the punishment of those who commit the same offense a second or more times. It denies to certain persons the equal protection of the laws. 2nd. In so far as it increases the punishment of a crime because of the conviction for some former crime or deprives a prisoner of his right to be punished for a crime committed by him upon the facts constituting that crime, regardless of his character, unless he puts his character in issue, and regardless of other crimes committed in the past, is a second punishment for an offense already expiated.

The second Federal question is as follows: The indictment charged appellant with burglary in the first degree and larceny. The jury acquitted him of both of these charges and convicted him of burglary in the second degree, as defined in section 3523,
87 Revised Statute of Mo., 1889, as is shown by the evidence in the record, and assessed his punishment at life imprisonment in the penitentiary.

The elements composing burglary in the second degree are entirely different from those composing burglary in the first degree, and the crime of burglary in the second degree is not included in nor is it a component part of burglary in the first degree.

Hence appellant claims the jury had no more right to convict him of burglary in the second degree than they had to convict him of assault with intent to kill or rape or murder, or any other crime for which he was not indicted.

Therefore appellant is now deprived of his liberty "without due process of law," because the constitution and laws of Missouri provides that no person shall be proceeded against for a felony except by an indictment informing him of the nature and cause of the accusation against him, and informing him in such a clear manner that he can prepare his defense and can be protected against a second prosecution for the same offense. Appellant states there are other Federal questions raised and involved, as is shown by the record, in the motion to quash the indictment and for a new trial and in arrest of judgment.

Appellant further states that an appeal is not asked for vexation or delay, but because he verily believes that he has been injured by the action of this court in affirming the judgment of the St. Louis circuit court.

STATE OF MISSOURI, }
County of Cole, } *ss:*

Frank Moore, being duly sworn, on his oath states that the matters of fact above set forth are true to the best of his knowledge and belief.

FRANK MOORE.

88 Subscribed and sworn to before me this 27th day of June, A. D. 1894.

[SEAL.] DANTE BARTON,
Notary Public, Cole County, Mo.

My commission expires April 13, 1897.

89 And afterwards, to wit, on the 9th day of July, 1894, the further following proceedings were had in said cause, viz:

STATE OF MO., Resp., }
v.
FRANK MOORE, App. }

Now, at this day, the court, having fully considered and understood the motion heretofore filed for an appeal to the Supreme Court of the United States, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 15th day of September, 1894, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, Respondent, }
vs.
FRANK MOORE, Appellant. }

Now, on the 15th day of September, 1894, there was presented to the Honorable James B. Gantt, presiding judge of division No. 2 of the supreme court of Missouri, in chambers, a writ of error to the Supreme Court of the United States, and a citation directed to said

respondent, citing and admonishing it to be and appear at a Supreme Court of the United States on the ninth day of October, 1894; which said writ of error was allowed and said citation signed and ordered to be filed and made a part of the record herein.

90 And afterwards, to wit, on the 8th day of October, 1894, the *the* further following proceedings were had in said cause to wit:

STATE OF MISSOURI, Respondent,
vs.
FRANK MOORE, Appellant.

Comes now the said appellant, by attorney, and files his bond in the sum of three hundred dollars ($300); which said bond is approved, ordered to be filed and made a part of the record herein.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, Frank Moore, as principal, and —— —— — —— ——, as sureties, are held and firmly bound unto the State of Missouri in the full and just sum of three hundred dollars, to be paid to the said State of Missouri; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the April term, A. D. 1894, of the supreme court of Missouri, in a suit depending in said court between The State of Missouri, respondent, and Frank Moore, appellant, judgment was rendered against the said Frank Moore, appellant as aforesaid, and the said Frank Moore, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Missouri, citing and admonishing it to be and appear at a Supreme Court of the United
91 States to be held at Washington, D. C., on the ninth day of October next:

Now, the condition of the above obligation is such that if the said Frank Moore shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

FRANK MOORE. [SEAL.]
CHAS. P. JOHNSON. [SEAL.]
CHARLES T. NOLAND. [SEAL.]

Sealed and delivered in presence of—

E. L. CLENCH.
H. P. NOLAND.

Approved by—

JAS. B. GANTT, *Judge.*

STATE OF MISSOURI, } *sct:*
City of St. Louis, }

Before me, H. P. Noland, personally appeared Charles P. Johnson, to me well known, who upon his oath states that he is worth over and above his indebtedness the sum of three hundred dollars, and that he owns real property to that amount subject to execution in the city of St. Louis, Missouri.

CHAS. P. JOHNSON.

Subscribed and sworn to before me this 6th day of October, 1894.

[SEAL.] H. P. NOLAND,
Notary Public within and for the City of St. Louis.

My term expires June 3, 1898.

STATE OF MISSOURI, } *sct:*
City of St. Louis, }

Before me, H. P. Noland, personally appeared Charles T.
92 Noland, to me well known, who upon his oath states that he is worth over and above his indebtedness the sum of three hundred dollars subject to execution in the city of St. Louis, Missouri.

CHARLES T. NOLAND.

Subscribed and sworn to before me this 6th day of October, 1894.

[SEAL.] H. P. NOLAND,
Notary Public within and for the City of St. Louis.

My term expires June 3d, 1898.

93 STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings had and made by this court in the above-entitled cause, as fully and complete as the same appears of record and on file in this office.

Seal of the Supreme Court of Missouri.

In testimony whereof I have hereunto set my hand and affixed the seal of said court. Done at office this 20th day of September, A. D. 1894.

JNO. R. GREEN,
Clerk Supreme Court.

Endorsed on cover: Case No. 15,744. Missouri supreme court. Term No., 493. Frank Moore, plaintiff in error, *vs.* The State of Missouri. Filed December 6th, 1894.

Office Supreme Court, U. S.
FILED.
MAR 26 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. ~~5111~~ 493

FRANK MOORE, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR.

Motion to Advance Cause upon the Docket.

Now, at this day, comes the above-named plaintiff in error and moves the Court to advance upon the docket the above-styled cause and to order a supersedeas to issue, and, in support of this motion, plaintiff in error respectfully represents and shows to this honorable Court that he was convicted of a felony in the St. Louis criminal court at its November term, 1893, and sentenced to imprisonment for life in the State penitentiary, and this conviction was sustained in the supreme court of Missouri at its April term, 1894, and, one or more Federal questions being raised and presented in the record, a writ of error was granted by the supreme court to the Supreme Court of the United States.

That plaintiff in error is now confined in the State penitentiary, undergoing said sentence of life imprisonment.

Plaintiff in error further represents that he is in bad health, as appears from the certificate of the physician in charge of the penitentiary of Missouri, herewith filed, and plaintiff in error believes great injury to his health and danger to his life will ensue if he is obliged to remain incarcerated in the penitentiary and perform the daily work required of him in said penal institution.

FRANK MOORE.

STATE OF MISSOURI, } ss:
County of Cole, }

Frank Moore, of lawful age, being duly sworn, upon his oath states that the matters and facts above set forth are true.

FRANK MOORE.

Subscribed and sworn to before me this 16th day of March, 1895.

[SEAL.] ROBERT H. BERRYMAN,
Notary Public, Cole County, Missouri.

I hereby consent to the advancement of this cause as prayed in the above petition, but not to the granting of the supersedeas.

R. F. WALKER,
Attorney General of Missouri, for Defendant in Error.

Respectfully submitted.

CHARLES T. NOLAND,
Attorney for Plaintiff in Error.

JAMES L. PACE, warden. } OFFICE OF WARDEN,
MISSOURI STATE PENITENTIARY,

JEFFERSON CITY, MO., *March* 18, 1895.

Chas. T. Noland, Esq., St. Louis.

DEAR SIR: In regard to your inquiry concerning the physical condition of convict Frank Moore, I beg to say

that I regard him as being in a fair physical condition at the present time. I examined carefully his heart and lungs and failed to find any organic lesion of either of these organs. If he has ever received any gunshot injury to lungs, at present there is no indication of disease therefrom.

Respectfully,

GEO. H. WILLIAMS,
Prison Physician.

[Endorsed:] Case No. 15,744. Supreme Court U. S., October term, 1894. Term No., 860. Frank Moore, pl'ff in error, *vs.* The State of Missouri. Motion to advance and for supersedeas. Office Supreme Court U. S. Filed Mar. 26, 1895. James H. McKenney, clerk.

Supreme Court of the United

FRANK MOORE,

THE STATE OF

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

FRANK MOORE,
Plaintiff in Error.

vs. No. 493.

THE STATE OF MISSOURI,
Defendant in Error.

STATEMENT OF THE CASE.

At the July Term, 1893, of the St. Louis Criminal Court, the following indictment was returned:

"State of Missouri, } ss.
City of St. Louis. }

St. Louis Criminal Court, July Term, 1893.

The grand jurors of the State of Missouri, within and for the body of the City of St. Louis, now here in court duly empaneled, sworn and charged, upon their oaths present that Frank Moore, late of the City of St. Louis, aforesaid, and State aforesaid, on the 11th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the City of St. Louis, aforesaid, in the St. Louis Criminal Court, was duly convicted on his own confession of the offense of grand larceny, and in accordance with said conviction was duly sentenced by said court

to an imprisonment in the penitentiary for the term of three years, and was duly imprisoned in said penitentiary in accordance with said sentence, and that said Frank Moore, after his discharge from said penitentiary and upon compliance with said sentence, afterward, to-wit, on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety-three, at the City of St. Louis aforesaid, being armed with a dangerous weapon, to-wit, a pistol, the dwelling house of S. M. Tucker there situate and being, and in which said dwelling house there was at the time a human being, feloniously, maliciously and burglariously did break *into* and *enter* by *forcibly turning the lock* of the *outer door* of said dwelling house, with the intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, chattels and personal property in the said dwelling house then and there kept and deposited; and then and there in the said dwelling house forty dollars, good and lawful money of the United States of the value of forty dollars, also three watches, all of value of sixty dollars, of the goods, chattels and personal property of V. P. Stevens in the dwelling house aforesaid, then and there being found, feloniously and burglariously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

This indictment was properly signed and endorsed and filed. Two motions to quash this indictment were filed by Joseph Furlong, an attorney appointed by the court to defend the accused.

One of the motions related merely to the form of the indictment, and the other was as follows:

In the St. Louis Criminal Court, November Term, 1893,

State of Missouri, }
v. }
Frank Moore. }

On indictment for burglary, first degree, and larceny.

Now comes the defendant, in his own proper person and by attorney, and ask the court to quash the indictment No. 95, July Term, 1893, because section No. 3959, under which the said indictment purports to charge the defendant with a former conviction, is unconstitutional and illegal and void and in conflict with the Constitution of the United States and the State of Missouri.

FRANK MOORE,
By his Att'y, Joseph Furlong.

Both motions to quash the indictment were overruled and exceptions to the court's rulings were duly saved.

At the November Term of the St. Louis Criminal Court the cause came on for trial.

The defendant refused to permit the said Furlong to further act as his attorney, and, declining the offer of the court to appoint another attorney to defend him, tried his case himself, the court assuring him that he had no prejudice against him, and would see the State took no unfair advantage of him.

The testimony for the State showed that the prisoner entered the dwelling house of Mr. Tucker after midnight through the front door, which had been *left open* by the proprietor for the convenience of boarders; that he proceeded upstairs and entered a room occupied by Mr. V. P. Stevens and Mr. Thomas Pierce; that he entered through a door which was closed, but not locked; that although the door was provided with a lock and key, yet the key was not turned nor the door locked; that the door of the room was closed by Mr. Stephens when he retired. Mr. Pierce awoke from his sleep and saw Moore leaving the room.

He saw him by means of a flash of lightning, there being a violent storm in progress at the time.

Mr. Pierce arose, and, following Moore into the bath-room, asked him what he was doing with his clothes. Moore told him to go back into his room, and showed Pierce a pistol. Pierce went back into the room, but Stephens came out and grappled with Moore, and Moore shot him, the bullet entering the cheek. Stephens over-powered Moore and a policeman soon appeared and arrested Moore, and took him to the Four Courts for imprisonment, pending a preliminary examination.

In support of the charge of a prior conviction for grand larceny, the State introduced the record of the St. Louis Criminal Court, showing the plea of guilty to charge of grand larceny, and of the sentence of the court based on that plea. It also introduced officers who identified the prisoner as the same person convicted of grand larceny in 1877, and introduced the return of the sheriff, showing that he had delivered Moore to the warden of the penitentiary, and the warden's receipt for the prisoner given to the sheriff.

This was all the evidence for the State, and the accused then took the stand, acknowledged the larceny, but said the door of Stephens' and Pierce's room was open, and that he used no force and did not break anything, either to enter the house or the room.

There was no testimony as to how Moore got out of the penitentiary when sent there under the judgment of the St. Louis Criminal Court in 1877.

There was absolutely no proof of his *discharge* from the penitentiary. There was no proof that he was *pardoned*, or that he *complied with the sentence* against him.

The evidence having closed, the court read his instructions to the jury, telling them to *acquit the defendant of burglary in the first degree* with which he stood charged in the indictment, as there was no evidence to sustain that

charge, but instructed them as to burglary in the second degree under section 3523, of Revised Statutes of Missouri.

Burglary in the first degree is defined by section 3520, Revised Statutes of Missouri, 1889, as follows:

Sec. 3620. *Burglary in the First Degree.*—Every person who shall be convicted of breaking into and entering the dwelling house of another, in which there shall be at the time some human being, with intent to commit some felony or any larceny therein, either: First, by forcibly bursting or breaking the wall or outer door, window or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter; or second, by breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, aiding and assisting; or third, by unlocking an outer door by means of false keys, or by picking the lock thereof, shall be adjudged guilty of burglary in the first degree.

Burglary in the second degree is defined by several sections. Those sections are as follows:

Sec. 3521. *Burglary in the Second Degree.*—Every person who shall be convicted of breaking into a dwelling house, with the intent to commit a felony or any larceny, but under such circumstances as shall not constitute the offense of burglary in the first degree, shall be termed guilty of burglary in the second degree.

Sec. 3522. *Second Degree, Continued.*—Every person who shall enter into a dwelling house of another, in such manner as not to constitute any burglary, as hereinbefore specified, with intent to commit a felony or any larceny, or, being in the dwelling house of another, shall commit a felony or any larceny, and shall break any outer door, window, or shutter of a window, or any part of said house, to get out of the same, shall be adjudged guilty of burglary in the second degree.

Sec. 3523. *Second Degree, Continued.*—Every person

who, having entered the dwelling house of another through an open outer door or window, or other aperture not made by such person, shall break an inner door of the same house, with intent to commit any felony or larceny, shall be adjudged guilty of burglary in the second degree.

Sec. 3524. *Second Degree, Continued.*—Every person who, being admitted into any dwelling house, with the consent of the occupant thereof, or who, being lawfully in such house, shall break an inner door, with intent to commit a felony or larceny, shall be adjudged guilty of burglary in the second degree.

Sec. 3525. *Dwelling House Defined.*—No building shall be deemed a dwelling house, or any part of a dwelling house, within the meaning of the foregoing provisions, unless the same be joined to, immediately connected with, and is part of a dwelling house.

Sec. 3526. *Burglary, Second Degree, Continued.*—Every person who shall be convicted of breaking and entering: First, any building within the curtilage of a dwelling house, but not forming a part thereof; or second, any shop, store, booth, tent, warehouse or other building, or any boat or vessel, or any railroad car in which there shall be at the time some human being, or any goods, wares, merchandise or other valuable thing kept or deposited, with intent to steal or commit any felony therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Sec. 3527. *What Breaking not Burglary.*—The breaking out of any dwelling house, or the breaking of the inner door thereof, by any person being therein, shall not be deemed such breaking a dwelling house as to constitute burglary in any case other than such as are herein particularly specified.

Sec. 3528. *Burglary in First and Second Degrees, How Punished.*—Every person who shall be convicted of burglary, shall be punished by imprisonment in the peniten-

tiary. If in the first degree, not less than ten years; if in the second degree, not less than three years.

The section of the Missouri statutes, 1889, commonly called "The Habitual Criminal Act," is as follows:

Sec. 3959. *Second Offense, How Punished.*—If any person convicted of any offense punishable by imprisonment in the penitentiary, or of petit larceny, or of any attempt to commit an offense, which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall be subsequently convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under the provisions of this law, might extend to imprisonment for life, then such person shall be punished by imprisonment for life; second, if such subsequent offense be such that upon first conviction the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years.

The constitution of Missouri contains the following provisions:

"Article II, Sec. 12. *Felonies Prosecuted by Indictment, Other Offenses by Indictment or Information.*—That no person shall, for felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in

time of war or public danger; in all other cases, offenses shall be prosecuted criminally by indictment or information as concurrent remedies."

Sec. 22. *Rights of Accused in Criminal Prosecution.*—In criminal prosecution the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witness in his behalf; and a speedy public trial by an impartial jury of the county.

Sec. 23. *Accused not Compelled to Testify Twice in Jeopardy, Etc.*—That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to the correct principles of law.

Sec. 25. *Excessive Bail and Unusual Punishment.*—That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Sec. 30. *Due Process of Law—Person.*—That no person shall be deprived of life, liberty or property without due process of law.

The indictment charged burglary in the first degree under section 3520 of Rev. Stat. of 1889, "by forcibly turning the lock of the outer door," yet the court instructed that if the jury found from the evidence that the de-

fendant broke an inner door after he had "entered said dwelling house through an open outer door," and broke said inner door "with the intent to commit larceny therein," they should convict defendant of burglary in the second degree.

The court further instructed that "the mere opening of a door that is closed constitutes burglary in the second degree as used in these instructions."

The jury were instructed that if they convicted defendant of burglary in the second degree, they should "assess his punishment at imprisonment in the penitentiary for any term not less than three years, "unless you find that he was formerly convicted of grand larceny as set out in a subsequent instruction, *in which case* you *will* assess his punishment at imprisonment in the penitentiary for *life* as therein set out."

The instructions upon which the errors complained of herein are predicated, are as follows:

The court further instructs you, that if you believe and find from the evidence in the cause that the building mentioned in the indictment was the dwelling house of S. M. Tucker, on the 26th day of May, 1893, and further find that the defendant, at the City of St. Louis, on the 26th day of May, 1893, entered said dwelling house through an open outer door and broke an inner door of said house, with the intent to commit larceny therein, you will find the defendant guilty of burglary in the second degree, and unless you so find you will acquit him of burglary in the second degree.

If you convict the defendant of burglary in the second degree, you will assess his punishment at imprisonment in the penitentiary for any term of years, not less than three years, unless you find that he was formerly convicted of grand larceny, as set out in a subsequent instruction, in which case you will assess his punishment at imprisonment in the penitentiary for life, as therein set out.

As to the punishment you should assess in case you convict the defendant of either burglary or larceny, the court instructs you as follows:

If you believe and find from the evidence in the cause that the defendant, Frank Moore, was on the 11th day of January, 1877, in the St. Louis Criminal Court, convicted on his own confession of grand larceny, and, in accordance therewith, sentenced by said court to an imprisonment in the penitentiary in this State for the term of three years, and was duly imprisoned therein in accordance with said sentence, and said defendant, after his discharge from said penitentiary upon compliance with said sentence, committed the burglary in the second degree hereinbefore defined, you should assess his punishment at imprisonment in the penitentiary for life.

The jury retired and returned the remarkable verdict that the defendant was not guilty of the larceny nor burglary in the first degree, *the only crimes with which he stood charged in the indictment*, but found him guilty of burglary in the second degree, and assessed his punishment at imprisonment in the penitentiary for *life*.

Within four days from the rendition of this verdict the prisoner employed the writer of this brief as his attorney, and straightway the following motion for a new trial (omitting the caption) was filed:

"Now comes the above named defendant and moves the court to set aside the verdict heretofore rendered and grant a new trial in said cause, for the following reasons:

1. Because the court erred in overruling defendant's motion to quash the indictment for the reason that it *violated both the State and Federal Constitutions.*

2. Because the court erred in refusing to quash the indictment upon the ground of duplicity.

3. Because the court erred in admitting incompetent and irrelevant evidence introduced by the State, after the court had assured the defendant that the court would protect the

rights and interests of defendant, and see to it that the State took no unfair advantage of the defendant in the trial.

4. Because the court erred in proceeding with the trial after the defendant had, in the presence of the jury, charged the honorable judge of this court with being so biased and prejudiced against defendant that he could not afford him a fair and impartial trial.

5. Because the court had no jurisdiction to try defendant after defendant had charged the court with being so prejudiced against him that he would not afford him a fair and impartial trial.

6. Because the court erred in forcing defendant to trial without the defendant having an attorney to assist, counsel and advise defendant and try the case for him.

7. Because the court erred in forcing defendant to trial without the presence of defendant's witnesses, whom defendant had used due dilligence to have present.

8. Because the court erred in its instructions given to the jury of its own motion.

9. Because the court erred in failing to fully and properly instruct the jury upon the law applicable to the case.

10. *Because the evidence adduced failed to support the allegations of the indictment*, and the court should have instructed the jury to acquit defendant.

11. Because the court erred in permitting the circuit attorney to make improper remarks to the jury, when under the circumstances it was the duty of the court to protect defendant against such injury.

12. Because the verdict is against the evidence, and the weight of evidence, and is against the law of the case.

This motion was overruled and an exception duly saved.

Within four days from the day said motion was overruled defendant filed the following motion in arrest of judgment, omitting the caption:

"Now comes the above-named defendant, after having filed heretofore a motion for a new trial, and moves the court to arrest the judgment in said cause, for the following reasons:

1. Because the verdict is insufficient in law to sustain a judgment.

2. Because the indictment is insufficient to sustain a judgment for the reason that it is bad for duplicity—charges more than one offense in a single count.

3. Because the verdict is "guilty of burglary in the second degree," when the indictment charged burglary in the first degree, and burglary in the second degree is not a lesser offense of burglary in the first degree and included in it, but is a separate and distinct offense, differing in its elements from burglary in the first degree.

4. Because the statute upon which the indictment is founded is unconstitutional and void, in that it violates the 14th amendment of the Federal Constitution, and violates the "bill of rights" in the Constitution of Missouri, in prescribing a second punishment for the same offense, and different punishments for different persons committing the same offense.

5. Because the indictment, in charging a former conviction of another separate and distinct offense, attacked the defendant's character without its having been put in issue by defendant.

6. Because the indictment failed to properly and clearly inform defendant of the nature and cause of the accusation against him."

This motion in arrest was also overruled, and the defendant duly excepted at the time to the court's ruling. The case was then appealed to the Supreme Court of Missouri.

The law governing appeals in Missouri is as follows:

ART. VI., CONSTITUTION OF MISSOURI.

Sec. 1. *Judicial Power of State, Where Vested.*—The judicial power of the State, as to matters of law and equity,

except as in this constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, Circuit Courts, Criminal Courts, Probate Courts, County Courts and municipal corporation courts.

Sec. 2. *Supreme Court, Jurisdiction of.*—TheSupreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under the restrictions and limitations in this constitution provided.

Sec. 3. *Supreme Court, Superintending Control of.*—The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of *habeas corpus, mandamus, quo warranto, certiorari*, and other original remedial writs, and to hear and determine the same.

Sec. 12. *St. Louis Court of Appeals—Jurisdiction—Appeals to Supreme Court.*—There is hereby established in the City of St. Louis an Appellate Court, to be known as the "St. Louis Court of Appeals," the jurisdiction of which shall be coextensive with the City of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of *habeas corpus, quo warranto, mandamus, certiorari*, and other original remedial writs; and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. *Appeals shall lie* from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the constitution of the United States or of this State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this

State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and *in all cases of felony.*

The constitutional amendment adopted in November, 1884, does away with appeals from the St. Louis Court of Appeals by providing that in cases where such an appeal would lie the causes shall be appealed from the trial court direct to the Supreme Court.

Section 5 of the amendment is as follows:

SUPREME COURT, EXCLUSIVE APPELLATE JURISDICTION OF.—In all causes or proceedings *reviewable* by the Supreme Court, writs of error shall run from the Supreme Court directly to the Circuit Courts and to courts having the jurisdiction pertaining to Circuit Courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts.

The Revised Statutes of Missouri 1889, provides as follows:

"Sec. 4277. APPEALS.—In all cases of final judgment rendered upon any indictment, an appeal to the Supreme Court shall be allowed the defendant, if applied for during the term at which such judgment is rendered."

The appeal coming on to be heard and no brief being filed on the part of appellant, the court took the case as submitted, and in obedience to the law of Missouri examined the record and rendered judgment affirming the judgment of the trial court. They did this in obedience to section 4297, Rev. Stat. of Missouri, 1889, which is as follows:

Sec. 4297. *No Assignment, or Joinder in Error, Necessary.*—No assignment of error, or joinder in error, shall be necessary upon any appeal or writ of error, in a

criminal case, issued or taken pursuant to the foregoing provisions of this article; but the court shall proceed upon the return thereof without delay, and render judgment upon the *record* before them.

This section has been construed in State v. Davidson, 73 Mo. 428, 20 Mo. App. 335, 44 Mo. App. 85, 30 Mo. App. 139.

But the court did not decide *all* the points raised in the record, as was its duty. By this decision it decided that section 3959, Rev. Stat. of Missouri, 1889, was not in conflict with the constitution of Missouri, nor the constitution of the United States; but it failed to decide upon the point that the prisoner had been convicted of a felony for which he was not indicted, and thus was deprived of his liberty without "due process of law."

Within ten days after the rendition of said decision plaintiff in error (then appellant), filed a motion for a rehearing upon the ground that the record showed that the accused had been acquitted of all charged against him in the indictment, and yet was sentenced to the penitentiary for life for an offense not named in the indictment, nor included in any offense described therein. The motion also prayed the court to transfer the cause to the court *en banc* as provided by the amendment to the constitution of Missour adopted November, 1890, and published in Vol. 102 Mo. of the Supreme Court Reports.

This amendment is as follows:

Sec. 1. The Supreme Court shall consist of seven judges, and after the first Monday in January, 1891, shall be divided into two divisions, as follows: One division to consist of four judges of the court, and to be known as division number one; the other to consist of the remaining judges, and to be known as division number two. The divisions shall sit separately for the hearing and disposition of causes and matters pertaining thereto, and shall have concurrent jurisdiction of all matters and causes

in the Supreme Court, except that division number two shall have exclusive cognizance of all criminal cases pending in said court, provided that a cause therein may be transferred to the court as provided in section 4 of this amendment. The division of business, of which said divisions have concurrent jurisdiction, shall be made as the Supreme Court may determine. A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court.

Sec. 2. Upon the adoption of this amendment the governor shall appoint two additional judges of the Supreme Court, who shall hold their offices until the first Monday in January, 1893, and at the general election in the year 1892 their successors shall be elected, who shall hold their offices for a term of ten years, as other judges of the Supreme Court. The two judges appointed by the governor, together with the judge elected at the election in the year 1890, shall constitute division number two, and the remaining judges shall constitute division number one. The court shall elect its chief justice and each division a presiding judge thereof.

Sec. 3. The Supreme Court shall assign to each division the causes and matters to be heard by it, of which assignment due public notice shall be given, and all laws relating to practice in the Supreme Court, as well as the rules of the Supreme Court, shall apply to each division so far as they may be applicable thereto. The opinion of each division shall be in writing, and shall be filed in the causes in which they shall be respectively made during the term at which the cause is submitted, and such opinions shall be a part of the records of the Supreme Court. Each division shall have authority to issue original writs and exercise the powers enumerated in section three of article six of the constitution.

Sec. 4. When the judges of a division are equally divided in opinion in a cause or where a judge of a division dissents from the opinion therein, or where a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or, where a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.

Sec. 5. Whenever, in the opinion of the Supreme Court, the state of its docket with reference to the speedy disposition of the business of the court will justify dispensing with the divisions hereinbefore provided, the court shall dispense therewith, and the court shall thereafter hear and determine all causes pending in it. Provided, however, that the court shall have the power to again divide itself into divisions, in like manner and with like power and effect as hereinbefore provided, whenever [in the opinion of six judges thereof, entered of record, the condition of its docket with reference to the speedy disposition of the business of the court shall so require, and in such division the four oldest judges in commission shall constitute Division No. 1, and the remaining judges Division No. 2.

Sec. 6. All provisions of the constitution of the State and all laws thereof not consistent with this amendment shall, upon its adoption, be forever rescinded and of no effect.

This motion for a re-hearing and transfer of the case was overruled. Thereupon the accused filed a motion before the court *en banc* praying the court to set aside the decision of Division No. 2 of the Supreme Court of Missouri for the reason that said cause involves a federal question. The motion then sets out that section 3959 of the Rev. Stat. of Mo., known as the "Habitual Criminal Act," was in violation of the federal constitution in that it provided a second punishment for one offense; provided a cruel and unusual punishment; was unequal in its application, and denied to the accused the equal protection of the

law. The motion also sets out that the record presents another federal question, in this that he was sentenced to imprisonment in the penitentiary for life for a crime for which he was never indicted, and was acquitted upon all that he was charged with in the indictment on which he was tried, and that this conviction and sentence was without "due process of law." The motion also calls the court's attention to the fact that the first stated federal question was decided by Division No. 2, but that the second federal question was not decided by said court. The motion also calls attention to the fact that no matter whether the federal question should be decided one way or the other, the cause should be transferred to the court *en banc* as provided by the constitution, inasmuch as the record of the trial court showed that these federal questions had been raised and were therefore involved in the cause.

This motion was overruled by the court *en banc*, and straightway the accused filed another motion asking the court to set aside its order overruling the motion to order Division No. 2 to transfer the cause to the court *en banc*, and again stated the federal questions hereinbefore set forth, and also claiming a right to a hearing of his appeal by the full court sitting *en banc*. And this motion was overruled.

The accused thereupon filed a motion for an appeal to the Supreme Court of the United States and again stated the two federal questions already set forth. An appeal was denied the accused, but a writ of error was granted transferring this cause to the Supreme Court of the United States.

ASSIGNMENT OF ERRORS.

I.

Sec. 3959, Revised Statutes of Missouri 1889, is unconstitutional in that it violates the Fourteen Amendment to the Constitution of the United States: (a) by providing a second punishment for an offense in so far as the punishment for a second offense is increased by reason of a former offense having been committed (b) by providing cruel and unusual punishments; (c) by being unequal in its operation and depriving certain classes of persons of the equal protection of the law by denying to them substantial rights in the trial of the charge against them, such as (1) attacking the character of the accused without it first being put in issue; and (2) prejudicing the jury against the accused, thus denying to him a fair trial before an impartial jury; (d) by depriving persons who have been pardoned, of the benefits, rights, privileges and immunities granted by law by reason of such pardon.

II.

Burglary in the second degree not being a crime included in burglary in the first degree, the elements of the two crimes being entirely different, an indictment for burglary in the first degree will not sustain a conviction for burglary in the second degree; and a conviction for burglary in the second degree under an indictment charging burglary in the first degree is equivalent to a conviction for such offense upon no indictment, as the accused was not informed of the nature and cause of the accusation upon which he was convicted.

The Constitution of Missouri provides that every person accused of a felony shall be prosecuted by an indictment informing him of the nature and cause of the accusation against him; and by the common law he was entitled to such knowledge, either by indictment or information, in

order that he might properly defend himself and be protected against a second prosecution for the same offense.

A conviction for burglary in the second degree under the indictment and evidence in this case was without due process of law, according to the law in Missouri, and was a denial to the prisoner of the equal protection of the law.

III.

The Supreme Court of Missouri is composed of seven judges. There are two divisions of this court. Four judges sit in Division No. 1 and hear and determine only civil cases.

Division No. 2 consists of three judges who decide *all* criminal cases and such civil ones as are assigned to that division. But if in *either* division a Federal question is involved the losing party may ask to have such cause decided by the full court and upon such request being made by a proper motion the cause *must* be transferred to the court *en banc*, that is, the seven judges sitting as one court.

The record showed and division No. 2 decided the Federal question presented as to Sec. 3959 being in violation of the Fourteenth Amendment to the Constitution of the United States.

The record also showed that another Federal question was involved, to-wit: That a conviction for burglary in the second degree upon an indictment charging burglary in the first degree was the same in law though the accused had been convicted of a felony without any indictment whatever having been returned against him, and that such a conviction was without due process of law and hence violated the Fourteenth Amendment of the Federal constitution.

The accused filed a proper motion praying Division No. 2 to transfer the cause to the court *en banc*. This motion was overruled. The accused then filed a motion in the

court *en banc* asking the court *en banc* to order Division No. 2 to transfer the cause to the court *en banc*.

This motion was overruled. The prisoner by such action on the part of Division No. 2 and the whole court sitting *en banc* was denied the right guaranteed to him by the constitutional amendment adopted in 1890, of having his appeal heard and determined by the Supreme Court of Missouri composed of seven judges, and the judgment of Division No. 2 affirming the sentence of the trial court was without due process of law and deprived him of that protection which law granted to him as well as others similarly situated.

POINTS AND AUTHORITIES.

I.

Sec. 3959 Rev. Stat. 1889 violates the fourteenth amendment of the constitution of the United States. (1) It provides that a person may be twice punished for the same offense in so far as it provides an increased punishment for an offense by reason of the fact that the person charged has formerly been convicted of a different and distinct offense; (2) it provides cruel and unusual punishments; (3) it denies to certain classes of persons the equal protection of the law by depriving them of certain substantial rights during the trial: (*a*) by attacking the character of the accused without it first being put in issue; and (*b*) prejudices the jury, after its selection, against the prisoner and thus denies to him a trial by a fair and impartial jury—a common law right, and a right also guaranteed by the constitution and statute law of Missouri; (c) it deprives those who have been pardoned for committing an offense or convicted of an alleged offense of the rights given by law by reason of such pardon.

A pardon wipes out every penalty attaching to the conviction for an offense and the person pardoned stands as though no offense had ever been committed by him, and he has every right, privilege, and immunity of other citizens, yet this statute singles out such class of citizens, and provides they shall not be tried in the usual manner provided by law and if convicted all discretion is taken from the jury as to fixing the punishment.

Hayes v. Missouri, 120 U. S. 68.
Missouri v. Lewis, 101 U. S. 22.
Barbier v. Connelly, 113 U. S. 27.
Yick Wo v. Hopkins, 118 U. S. 356.

II.

Burglary in the second degree is not a lesser degree of burglary in the first degree and included in it, as murder in the second degree and manslaughter are included in murder in the first degree.

The elements composing burglary in the second degree are entirely different from those of burglary in the first degree, just as the elements of robbery in the second degree are not included in the crime of robbery in the first degree.

Revised Stat. of Missouri, § 3520 to § 3528.
State v. Alexander, 56 Mo. 131.
State v. Jenkins, 36 Mo. 372.
State v. Davidson, 38 Mo. 374.
State v. Brannan, 55 Mo. 63.
State v. Harmon, 106 Mo. 635.
State v. Gabriel, 88 Mo. 631.
State v. Arter, 65 Mo. 553.
State v. Stone, 68 Mo. 101.
State v. Kneeland, 90 Mo. 337.

Therefore the statute, Sec. 3950, Rev. Stat. 1889, providing that convictions for a lesser degree will be sustained by an indictment charging a higher degree does not apply in this case.

State v. Frank, 103 Mo. 120.

The right to be informed of the nature and cause of the accusation is a common law right, and in cases of felony the constitution of Missouri provides that such information must be given by an indictment.

Art. II, Sec. 12, Constitution of Missouri.

Burglary in the second degree is a felony and in Missouri due process of law requires that it be prosecuted by indictment.

Hurtado v. California, 110 U. S. 516.

Ex parte Baim, 121 U. S. 1.
Ex parte Wilson, 114 U. S. 417.
11 Pick. 432, 22 N. W. R. 435.
42 Fed. R. 587, 150 Mass. 66.
130 Mass. 35, 47 Me. 426.
45 Ind. 338, 25 Tex. 722.
40 Fed. R. 71, 60 Me. 504.
104 Ind. 542, 13 U. S. Sup. Ct. R. 959.
15 U. S. Sup. Ct. R. 727, 137 U. S. 692.
139 U. S. 653, 30 Wis. 149.
26 Fed. R. 906, 139 U. S. 449.
State v. Levy *et al.*, 119 Mo. 442, and cases cited.
Spies v. Illinois, 123 U. S. 131.

The action of the State judiciary in denying to plaintiff in error the equal protection of the law is the action of the State as much so as though the legislature had denied him such right by special enactment.

Ex parte Virginia, 100 U. S. 339.
Strander v. West Virginia, 100 U. S. 303.
Virginia v. Rivers, 100 U. S. 313.
Neal v. Delaware, 103 U. S. 370.
Civil Rights Cases, 109 U. S. 3.
Yick Wo v. Hopkins, 118 U. S. 356.

III.

The prisoner being entitled to a hearing of his appeal by the full Supreme Court the judges sitting *en banc*, by reason of two Federal questions being involved in the record, a denial of this right causes the judgment of Division No. 2 of the Supreme Court to be without due process of law.

Missouri v. Louis, 101 U. S. 22.
Hayes v. Missouri, 120 U. S. 68.
Amendment of 1890 of the Constitution of Missouri, Sec. 4.

Respectfully submitted,

CHARLES T. NOLAND,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
OCT 24 1895

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1895.

FRANK MOORE,
Plaintiff in Error,
vs.
THE STATE OF MISSOURI,
Defendant in Error.

Writ of Error to Supreme Court of Missouri.

STATEMENT OF THE DEFENDANT IN ERROR.

R. F. WALKER, Attorney-General of Missouri,
For Defendant in Error.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1895.

FRANK MOORE,
Plaintiff in Error,
vs.
THE STATE OF MISSOURI,
Defendant in Error.

Writ of Error to Supreme Court of Missouri.

STATEMENT OF THE DEFENDANT IN ERROR.

At the July term (1893) of the St. Louis Criminal Court, in the city of St. Louis and State of Missouri, there was an indictment returned into said Court by the grand jury against the plaintiff in error, in the words following (original record, p. 4):

State of Missouri, } ss.
City of St. Louis. }

St. Louis Criminal Court, July Term, 1893.

The grand jurors of the State of Missouri, within and for the body of the City of St. Louis, now here in court duly empanneled, sworn and charged, upon their oath present:

That Frank Moore, late of the City of St. Louis aforesaid, on the eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the City of St. Louis aforesaid, in the St. Louis Criminal Court, was duly convicted, on his own confession,

of the offense of grand larceny, and in accordance with said conviction was duly sentenced by said Court to an imprisonment in the penitentiary for the term of three years, and was duly imprisoned in said penitentiary in accordance with said sentence; and that the said **Frank** *Moore,* AFTER HIS DISCHARGE *from said penitentiary, upon compliance with said sentence,* AFTERWARDS, to wit, on the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and ninety-three, at the city of St. Louis aforesaid, being armed with a dangerous weapon, to wit, a pistol, the dwelling-house of S. M. Tucker, there situate and being, and in which said dwelling-house there was at the time a human being, feloniously, maliciously and burglariously did break and enter, by forcibly turning the lock of the outer door of said dwelling-house, with the intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, chattels and personal property in the said dwelling-house then and there kept and deposited; and then and there, in the said dwelling-house, forty dollars, good and lawful money of the United States, of the value of forty dollars, also three watches, all of the value of sixty dollars, of the goods, chattels and personal property of V. P. Stephens in the dwelling-house aforesaid then and there being found, feloniously and burglariously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

JESSE A. MCDONALD,
Assistant Circuit Attorney.

The statutes of the State of Missouri, under which the indictment was found, and upon which it was framed, are contained in volume I Revised Statutes of 1889, and are as follows:

1. *Burglary in the first degree.*—Every person who shall be convicted of breaking into and entering the dwelling-house of another, in which there shall be at the time some human being, with intent to commit some felony or any larceny therein, either, (first) by forcibly bursting or breaking the wall or outer door, window or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter; or (second) by breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, aiding and assisting; or (third) by unlocking an outer door by means of false keys, or by picking the lock thereof, shall be adjudged guilty of burglary in the first degree.

Rev. Stat. Missouri (1889), vol. I, sec. 3520, p. 858.

2. *Burglary in the first and second degrees, how punished.*—Every person who shall be convicted of burglary shall be punished by imprisonment in the penitentiary: If in the first degree, not less than ten years; if in the second degree, *not less than three years.*

Rev. Stat. Missouri (1889), vol. 1, sec. 3528, p. 859.

3. *Burglary and larceny.*—If any person in committing burglary shall also commit a larceny, he may be prosecuted for both offenses in the same count, or in separate counts of the same indictment, and on conviction of such burglary and larceny shall be punished by imprisonment in the penitentiary, in addition to the punishment hereinbefore prescribed for the burglary, not less than two nor more than five years.

Rev. Stat. Missouri (1889) vol. 1, 3529, p. 859.

4. *Larceny in dwelling house, etc.*—If any larceny be committed in a dwelling-house, or in any boat or vessel, or in any railroad car, or by stealing from the person in the night-time, if the value of the property taken is thirty dollars or upward, the offender shall be punished by imprisonment in the penitentiary not exceeding seven years.

Rev. Stat. Missouri (1889), vol. 1, sec. 3537, p. 860.

5. *Second offense—how punished.—If any person convicted of any offense punishable by imprisonment in the penitentiary, or of petit larceny, or of any attempt to commit an offense, which if perpetrated would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that upon a first conviction the offender would be punishable by imprisonment for life or for a term which, under the provisions of this law, might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life.* * * * * * * *

Rev. Stat. Missouri (1889), vol. 1, sec. 3959, p. 937.

This section is a re-enactment and an exact rescript of the statute of Missouri of 1879.

Rev. Stat. Missouri (1879), vol. 1, sec. 1664, p. 286,

Which was a re-enactment and rescript of

Gen. Stat. Missouri (1865), sec. 7, p. 825.

When the plaintiff in error was arraigned upon the said indictment at the July term, 1893, of said Court, he entered HIS PLEA OF NOT GUILTY; but at the November term, 1893, by leave of Court, he withdrew his plea and pleaded a motion to quash the indictment, which was as follows: (Rec. pp. 11, 12).

State of Missouri

vs.

Frank Moore.

In the St. Louis Criminal Court, November term, 1893.

ON INDICTMENT FOR BURGLARY, FIRST DEGREE, AND LARCENY.

"Now comes the defendant in his own proper person and by attorney, and asks the Court to quash the indictment (No. 95, July term, 1893), because section 3959, under which the said indictment purports to charge the defendant with a former conviction, is unconstitutional and illegal and void, and is in conflict with the Constitution of the United States and State of Missouri. FRANK MOORE,

By his attorney, JOSEPH FURLING."

This motion was overruled by the Court on the same day that it was filed (to which ruling the plaintiff in error duly excepted). Plaintiff in error was thereupon again arraigned upon the indictment, again entered his plea of not guilty and was put upon his trial.

The evidence tended to prove a statutory burglary *in the second degree* and a larceny, accompanied by a murderous assault with a pistol upon the owner of the property, who in securing the person of plaintiff in error in the house was shot by the latter in the head; and also that plaintiff in error had been formerly convicted in the same court upon his own confession of grand larceny, had been sentenced to and confined in the penitentiary in accordance with such conviction, as stated in the indictment, *supra*.

In charging the jury, the Court instructed that under the evidence they could not convict of burglary in the first degree, but might convict of burglary in the second degree, the punishment for which was imprisonment in the penitentiary for a *term not less than three years*; and among other things said (record, p. 50): "As to the punishment which you should assess, in case you convict the defendant of either burglary or larceny, the Court instructs you as follows: If you believe and find, from the evidence in the cause, that the defendant, Frank Moore, was, on the eleventh day of January, 1877, in the St. Louis Criminal Court, convicted on his own confession of grand larceny, and in accordance therewith sentenced by said Court to an imprisonment in the penitentiary in this State for the term of three years, and was

duly imprisoned therein in accordance with said sentence, and said defendant, after his discharge from said penitentiary upon compliance with said sentence, committed the burglary in the second degree hereinbefore defined, you should assess his punishment at imprisonment in the penitentiary for life," etc. To the giving of which instruction plaintiff in error excepted.

The jury returned the following verdict (Rec. p. 8):

"State of Missouri, vs. Frank Moore. } On indictment for burglary in the first degree and larceny.

We, the jury in the above entitled cause, find the defendant guilty of burglary in the second degree, and assess his punishment at imprisonment in the penitentiary *for life.*

GEO. H. MCCONNELL, Foreman."

Plaintiff in error filed his motion for new trial, assigning several grounds of error, the first being that

"The Court erred in overruling defendant's motion to quash the indictment, for the reason that *it* violated both the State and Federal constitutions." (Rec. p. 53.)

The motion was overuled and exception duly saved.

Plaintiff in error then filed a motion in arrest of judgment, assigning several grounds, among which was the following (Rec. p. 60):

"Because the statute upon which the indictment is founded is unconstitutional and void, in that it violates the Fourteenth amendment of the Federal Constitution * * * * in *prescribing a second punishment for the same offense*, and *different punishments for different persons committing the same offense.*"

This motion likewise was overruled, exception to this ruling being duly saved.

Judgment was thereupon rendered against plaintiff in error in accordance with the verdict, and he was sentenced to a life imprisonment in the penitentiary. He prayed and was allowed an appeal to the Supreme Court of Missouri, execution of the sentence being stayed pending the appeal.

The appeal came on to be heard in the Supreme Court of Missouri, Division No. 2, at the April term, 1894, thereof, and the judgment of the Criminal Court in all things affirmed, and plaintiff in error was committed to the penitentiary in accordance with such judgment, where he now is.

In its opinion of affirmance, the Supreme Court said (Rec. pp. 69-72): "It is difficult to conjecture wherein or in what manner the statute (R. S. 1889, sec. 3959, *supra*) imposing a greater punishment for a second criminal offense, is a violation of the constitution, either

in putting a person twice in jeopardy or as prescribing different punishments for different persons committing the same offense. The clauses of the Constitution of the United States which it was contended were violated, are those which provide, *first*, that, nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb, and, *second*, nor cruel and unusual punishments be inflicted. "Quoting" and citing People vs. Stanley, 47 Cal. 113. Rand vs. Commonwealth, 9 Grattan (Va.) 743. Ross case, 2 Pickering (Mass.) 170. Plumbly vs. Commonwealth, 2 Metcalf (Mass.) 413. Ingalls vs. State, 48 Wisconsin 647. Maguire vs. State, 47 Maryland 485.

"The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for a second time, but a severer punishment for the subsequent offense—the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the provisions of our constitution herebefore quoted. We are not inclined to think the punishment imposed for the second offense of a crime of so grave a character either cruel or unusual. * * * * The fact that the indictment charged *a former conviction of another and entirely different offense* is not, in fact, charging him with an offense with respect of the former offense in the case in hand. The averments as to the former offense go as to the punishment only. * * *"

State vs. Moore, 121 Mo. 514.

After the rendition of the foregoing opinion, plaintiff in error filed his motion for a rehearing (Rec. p. 75), on the ground

"That this record shows that the accused was acquitted by the jury in all and every charge against him in the indictment, and yet stands sentenced to the penitentiary for life for an offense not named in the indictment nor included in any offense described therein, and *thus is deprived of his constitutional right* of being prosecuted under an indictment informing him of the nature and cause of the accusations against him. * * * * In the Criminal Court a constitutional question was raised upon a motion to quash the indictment, and the point was renewed in the motion for a new trial and the motion in arrest of judgment, as is shown by the record," etc.

The Court refused the motion for rehearing, and also refused to transfer the cause to the court *in banc*. (Rec. p. 76.)

Thereupon plaintiff in error made his application to the court *in banc* to transfer the cause to the court *in banc* (Rec. pp. 77, 78), "*for*

the reason that said cause involves a federal question," and in said application alleged as follows:

"In support of this motion it is respectfully shown to the Court that *the record discloses that several Federal questions* are involved, as follows:

1. By motions to quash the indictment, a new trial and in arrest of judgment, the Federal question was raised that the statute on which the indictment was founded, known as the *habitual criminal act*, provided a second punishment for one offense; provided a cruel and unusual punishment was unequal in its operations, and denied to appellant the equal protection of the law, in this, that it violated the rule laid down by the Supreme Court of the United States in Mo. vs. Hays; that the test is: *Does the law apply to all alike in the same territory.*"

Division No. 2, in its opinion decides that the statute does not violate either Federal or State constitution by providing a second punishment for the same offense, nor does it provide a cruel and unusual punishment; but the opinion fails to pass on the question of *its being unequal in its operation*, thus denying to some certain persons the equal protection of the law.

"2. The appellant stands sentenced to imprisonment in the penitentiary for life for a crime he was never indicted for, and stands acquitted for all he was charged with in the indictment on which he was tried. *Due process of law* in Missouri, and also under the Federal constitution, requires that no person shall be proceeded against for a felony except by indictment. Thus, to convict and sentence appellant upon a felony never charged against him in any way, is a deprivation of his liberty without due process of law. * * * * * The above decisions, and Sec. 3950 of the Statutes, and Art. 2, Sec. 12 and 22, [Constitution of Missouri], clearly settle that the process of law in Missouri requires that a person shall be informed by indictment of the charge upon which a conviction can be founded. A denial of this right is a clear violation of the 4th amendment of the Federal constitution. * *"

The application was denied by the Court *in banc* (Rec. p. 82), and afterward plaintiff in error made second application for a transfer of the cause to Court *in banc* (Rec. p. 83), and this application was likewise denied (Rec. p. 85).

Thereupon, plaintiff in error filed his application for an appeal to the Supreme Court of the United States (Rec. pp. 85-87) on the grounds following:

"*First*—The statute 3959, upon which the indictment was based, violates the fourteenth amendment to the Constitution of the United

States, in this: 1st. It is unequal in its operation, by providing different punishments for those who have formerly been convicted of some offense than for citizens not so convicted. It is not a provision for the punishment of those who commit the same offense a second or more times. It denies to certain persons the equal protection of the laws. 2d. In so far as it increases the punishment of a crime because of the conviction for some former crime or deprives a, prisoner of his right to be punished for a crime committed by him upon the facts constituting that crime, regardless of his character, unless he puts his character in issue, and regardless of other crimes committed in the past, is a second punishment for an offense already expiated.

The second Federal question is as follows: The indictment charged appellant with burglary in the first degree and larceny. The jury acquitted him of both of these charges, and convicted him of burglary in the second degree, as defined in section 3523, Revised Statutes of Missouri, 1889, as is shown by the evidence in the record, and assessed his punishment at life imprisonment in the penitentiary. The elements composing burglary in the second degree are entirely different from those composing burglary in the first degree, and the crime of burglary in the second degree is not included in nor is it a component part of burglary in the first degree. Hence, appellant claims, the jury had no more right to convict him of burglary in the second degree than they had to convict him of assault with intent to kill, or rape, or murder, or any other crime for which he was not indicted.

Therefore appellant is deprived of his liberty *without due process of law,* because the constitution and laws *of Missouri* provide that no person shall be proceeded against for a felony except by an indictment informing him of the nature and cause of the accusation against him, and informing him in such clear manner that he can prepare his defense and can be protected against a second prosecution for the same offense.

Appellant states that *there are other Federal questions* raised and involved, as is shown by the record, in the motion to quash the indictment and for a new trial and in arrest of judgment * * * ."

This application for an appeal was denied (Rec. p. 89).

And thereupon was sued out this writ of error.

No. 493.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1895.

FRANK MOORE, Plaintiff in Error, vs. THE STATE OF MISSOURI, Defendant in Error.	Writ of Error in Supreme Court of Missouri.

MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

Now comes the defendant in error, the State of Missouri, by its counsel, R. F. Walker, Attorney-General of the State of Missouri, and moves the Court to dismiss the writ of error in the above entitled cause, for the reasons following:

1. Because it is apparent upon the record that no Federal question was involved in the pleadings, trial, proceedings and determination of the said cause, either in the St. Louis Criminal Court or in the Supreme Court of the State of Missouri.

2. Because it is apparent upon the record that no Federal question was presented to the State courts for their determination in said cause.

3. Because it is apparent upon the record that no Federal question was, in fact, decided by the State courts, and that no decision of any Federal question was necessarily involved in the judgment and decrees of the said State courts in said cause.

4. Because it is apparent upon the record that no Federal question was raised or decided in the opinion and judgment of said State courts in said cause.

5. Because it is apparent from the record that in the trial court, viz., the Criminal Court in the city of St. Louis, there was no statute nor any authority exercised under the State of Missouri drawn in question on the ground of being repugnant to any article, clause or provision of the constitution of the United States, or of the treaties or laws of the United States, and that there was no decision in favor of the validity of any such statute or authority as against the said constitution, treaties or laws.

Brief and Argument of Defendant in Error.

I.

The writ of error should be dismissed for want of jurisdiction, for there is no question presented by the record of which the Supreme Court of the United States ought to, or can, take cognizance.

It was claimed before the *court of trial* (the St. Louis Criminal Court), by motion to quash the indictment (Rec. p. 12), that the statute sec. 3959, known as the "Habitual Criminal act," *is in conflict with the Constitution of the Unitea States*; but the motion does not point out the manner in which it is thus in conflict, nor suggest the particular article, section or clause which is violated. Nothing could be more vague, indefinite and uncertain. If this be entertained, there is no reason why every criminal case in every state court may not find its way to this tribunal, on the filing of some sort of a motion suggesting that something in the case is repugnant to and in conflict with the Federal Constitution.

Nor is the point made more clear by the words "under which the said indictment purports to charge the defendant with a former conviction," for there is still no suggestion whatever as to how the statute in question is repugnant to or in violation of the Federal constitution.

Nor is the point (if any) in anywise strengthened by the motion for new trial (Rec. p. 53), since among the several grounds suggested for setting aside the verdict was this, that the Court erred in overruling defendant's motion to quash the indictment for the reason that IT violated both the State *and Federal* constitutions.

The motion in arrest of judgment (record, pp. 59–60) does not throw any additional light on the point, for it suggests as the fourth ground for arresting the judgment that *the statute upon which the indictment is founded* is unconstitutional and void, in that *it violates the fourteenth amendment of the Federal Constitution*

We find, therefore, all the way through the cause *in the trial court* a general, vague, indefinite suggestion that the statute under which

the indictment was drawn is in some way in conflict with the Federal Constitution, and at the very last the assertion that it is the *fourteenth amendment* which is involved.

It hardly seems that the plaintiff in error was dealing fairly with the trial court, but rather that he was merely suggesting some possible Federal question on which he might enlarge and amplify *after a conviction*, should he fail of acquittal or receive a severer sentence than *he was willing to take* (Record, p. 44).

It was really not until the Division No. 2 of the Supreme Court had decided the appeal from the trial court, and plaintiff in error was endeavoring to obtain a rehearing and a transfer of his appeal to the court *in banc*, that there was a clear, intelligible and unmistakable suggestion of a Federal question (Rec. p. 78), and it was then *first* suggested that by motion to quash, for new trial and in arrest, the Federal question *has been raised* that the "Habitual Criminal act" provided a *second punishment* for one offense, provided a *cruel and unusual* punishment, was *unequal in its operations*, and denied to the appellant the *equal protection of the law*, in that it violated the rule laid down by *this Court* in Missouri vs. Hays; that test is, "does the law apply to all alike in the same territory?"

Then and there also, for the first time, is the suggestion made that the appellant was acquitted of all the offenses charged against him, and convicted of an offense *not* charged against him, thus being deprived of his liberty without "due process of law," and that a denial of the right of the accused to be informed by indictment of the charge upon which a conviction can be founded is a clear violation of the *fourth* amendment to the Federal constitution.

And these suggestions were repeated in the application for an appeal to this Court (Rec. pp. 86, 87).

The rule is well settled that in order to be reviewable here, the question must not only be one of those specified in section 709 of the Revised Statutes of the United States, but it must also have been made and presented *in the trial court*. If the right (or wrong) was not set up or claimed in the proper court below, the judgment of the highest court in the action is conclusive, *so far as the right of review here is concerned.*

Spies vs. Illinois, 123 U. S. 131 (181).

Brooks vs. Missouri, 124 U. S. 394.

Duncan vs. Missouri, 152 U. S. 377.

Applying that rule, it is apparent upon the record that *on the trial* of the plaintiff in error in the St. Louis Criminal Court, no right, privilege or immunity was specially set up or claimed under the constitution of the United States.

II.

It is well settled, also, that the first ten articles of amendment to the Constitution of the United States (among which are the provisions against a second punishment for the same offense, against depriving the citizen of his liberty without due process of law, and the provision that the accused shall enjoy the right to be informed of the nature and cause of the accusation against him) were never intended to limit the powers of the several States in respect of their own people, but to operate on the *national government only*.

Spies vs. Illinois, 123 U. S. 131 (166) and cases there cited.

And therefore it is *not* a Federal question whether the statutes of Missouri (or of any other State or of all the other States) can be so construed as to permit a citizen of the State, under a State prosecution, to be for the same offense twice put in jeopardy of life or limb.

Hence, the suggestion in the motion to quash the indictment, on the ground that the said statute, sec. 3959, was in conflict with and repugnant to the Federal Constitution, even had it gone further and raised the point, under the first ten amendments, that the statute permitted a second punishment for the same offense, and the suggestion following in the motion for new trial, present absolutely nothing upon this record which this Court has any right or authority under sec. 709 of the U. S. Rev. Stat. to review.

III.

But it is urged in the motion in arrest that the statute No. 3959 is unconstitutional and void in, that it violates the *Fourteenth* amendment; presumably that portion of Sec. 1 which provides that no state shall "deprive any person of * * liberty, * * without *due process of law*, etc."

Even this suggestion, however, does not present any question for this Court to review.

It has been repeatedly adjudged what is meant by due process of law, by the decision of this Court.

Due process of law, as guaranteed by the Fourteenth amendment, is complied with when the party is regularly indicted by the proper grand jury in the State court; has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings he is deprived of no right to which he is lawfully entitled.

Ker v. Illinois, 119 U. S. 436 (440).

It is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issue affecting it, he has by *the laws of the State* a *fair trial* in a court of justice according to the mode of proceeding applicable to such cases.

Davidson vs. New Orleans, 90 U. S. 97 (107).

The privileges and immunities of citizens of the United States protected by the Fourteenth amendment are privileges and immunities arising out of the nature and essential character of the Federal government and granted or secured by the Constitution; and *due process of law* and the *equal protection of the law* are secured if the laws operate *on all alike*, and do not subject the individual to an arbitrary exercise of the powers of government.

The Fourteenth amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike, *under like circumstances and conditions*, both in the privileges conferred and the liabilities imposed.

Hays vs. Missouri, 120 U. S. 68 (71).

Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

Barber vs. Connolly, 113 U. S. 27, 32.

And see Missouri vs. Lewis, 101 U. S. 22.

Applying these principles to the case at bar, we see that the statute in question (it does not appear in the record, but has been set out in full in our statement, *supra*) is in nowise obnoxious to the objection suggested by plaintiff in error. It is certainly not "class legislation discriminating against some and favoring others," but like any

other criminal statute prescribes for a certain *class* of offenders a certain punishment, and all who come within its provisions are certainly treated alike; and applying the test, "Does the law apply to all alike in the same territory?" the answer (the only *correct* answer) is, It does.

Nor is the punishment cruel or unusual, as these terms are usually understood. It will be seen by reference to the statute, Rev. Stat. of Mo., No. 3528 (statement, *supra*), that the punishment for burglary in the second degree for the first offense, is imprisonment in the penitentiary for a term *not less than three years*, under which the jury might have imposed life imprisonment regardless of the question of a former conviction. And for all that appears from the verdict (Rec. p. 8), the jury may have wholly disregarded the testimony regarding the former conviction, and simply assessed the punishment for the offense for which he was upon trial.

IV.

But, assuming that some Federal question is raised by the record, the writ ought not to be allowed by the Court, if it appears from the face of the record that the decision of such Federal question, which is complained of, was so plainly right as not to require argument.

Spies vs. Illinois, 123 U. S. 131.

The question presented as to whether such a statute as is here assailed does in fact put the accused twice in jeopardy of life for the same offense, is not a new one. Such a statute is a part of the criminal law of every State in this Union; and wherever the question has been raised in the Court of last resort in any State, it has been decided contrary to the claim of plaintiff in error.

See People vs. Stanley, 47 California, 113 (116).
Ingalls vs. State, 48 Wisconsin, 647 (658).
Maguire vs. State, 47 Maryland, 485 (495–6).
Plumbly vs. Commonwealth, 2 Metcalf (Mass.) 413 (415).
Rand vs. Commonwealth, 9 Grattan (Virginia) 738.

R. F. WALKER, Attorney-General of Missouri,
For Defendant in Error.

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No. 493.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1895.

FRANK MOORE,
PLAINTIFF IN ERROR,
vs.
THE STATE OF MISSOURI,
DEFENDANT IN ERROR.

Error to the Supreme Court of Missouri.

Supplemental Brief and Argument of the Defendant in Error.

R. F. WALKER, ATT'Y-GEN'L, and
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For Defendant in Error.

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Error to the Supreme Court of Missouri.

Supplemental Brief and Argument of the Defendant in Error.

I.

It is urged by the plaintiff in error in his brief (p. 20, assignment of errors, III), that it was the bounden duty of the Division No. 2 of the Supreme Court of Missouri to transfer the cause to the Court *en banc* (the full bench of seven judges), because Federal questions were involved in the cause, viz.: (1) that the statute of Missouri, section 3959, is repugnant to and in violation of the Constitution of the United States; and (2) that a conviction of plaintiff in error of burglary in the second degree, under an indictment charging burglary in the first de-

gree, was a conviction of a felony without an indictment, and therefore without due process of law, in violation of the 14th amendment to the Federal constitution.

1. It is again respectfully urged by the defendant in error that the second of these grounds was not presented to the trial court nor to the appellate court until *after* the Supreme Court, Division No. 2, had affirmed the judgment. It was never claimed by him upon the trial nor in the Supreme Court, until he filed his motion for a rehearing (Record p. 75), that his conviction of burglary in the second degree, under this indictment, was unconstitutional, and, therefore, the Supreme Court did not, and could not possibly, decide any such alleged Federal question.

Simply assigning as a ground for a new trial (motion for new trial, clause 10, Record p. 54), "*because the evidence adduced failed to support the allegations of the indictment,* and the Court should have instructed the jury to acquit defendant," is not even the suggestion of a Federal question, else a Federal question is raised in every case in which a demurrer to the evidence is interposed.

There was absolutely nothing in this assignment of error to advise either the trial or Appellate Court that plaintiff in error was invoking the aid of the Federal Constitution, and hence he did not bring himself within the provisions of section 709 of the Revised Statutes of the United States.

Spies vs. Illinois, 123 U. S. 131.

Brooks vs. Missouri, 124 U. S. 394.

Therefore, so far as this point was concerned, the Supreme Court of Missouri might well say that there was no Federal question involved which demanded a review by the Court *en banc.*

2. And even had plaintiff in error in the assignment urged that he had been convicted of a felony without an indictment, in violation of article V of the amendments to the Federal Constitution, still no Federal question would have been presented, because it has been repeatedly determined by this Court, and is now well settled, that the first ten articles of amendments to the Constitution of the United States were never intended to limit the powers of the several states in respect of their own people, but to operate on the National Government alone.

Spies vs. Illinois, 123 U. S. 131 (166).

Hurtado vs. California, 110 U. S. 516.

3. The proceeding complained of, upon the face of the record, was in no sense violative of the Federal Constitution as being "without due process of law," or denying to the accused the equal protection of the law, as forbidden by amendments V and XIV.

It is only where the law is applied and administered by public authority with an evil eye and an unequal hand, so as to practically *make unjust and illegal discrimination between persons in similar circumstances*, material to their rights, that this tribunal will interfere.

Yo Wick vs. Hopkins, 118 U. S. 356 (373-4).

Due process of law, in the 5th amendment, refers to that law of the land which derives its authority *from the legislative powers conferred upon Congress* by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides *in the right of the people to make their own laws and alter them at pleasure.* It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative powers in furtherance of the general public good, which regards and preserves their principles of liberty and justice, must be held to be due process of law.

Hurtado vs. California, 110 U. S. 516 (535).

Due process of law and the equal protection of the laws are secured if the laws operate *on all alike*, and do not subject the individual to an arbitrary exercise of the powers of government.

Duncan vs. Missouri, 152 U. S. 377 (382).

It would seem, therefore, that the Supreme Court of Missouri in construing a statute of Missouri defining an offense against the public of Missouri, and holding that it was properly charged under an indictment framed in accordance with the laws of Missouri, was exercising a right which belonged to it as the ultimate tribunal of a sovereign State, and whose ruling was binding upon all the citizens of Missouri, and not subject to review by this Court. And if the Supreme Court of Missouri failed to pass upon that question *because it was not raised*

nor presented by the accused, much more should this Court hesitate to interfere with the judgment.

The Supreme Court of Missouri has the unquestioned right to decide *finally* whether an indictment returned by a grand jury in that State includes within its charge the offense of which the accused was convicted upon a trial under that indictment. And unless the statute upon which the indictment was based is repugnant to or violative of the plain meaning of some section or clause of the Federal Constitution, this Court has no authority to interfere.

Yo Wick vs. Hopkins, *supra*.

What right has *this* Court to say whether *under the statutes of Missouri* a charge of burglary in the second degree is not necessarily included in a charge of burglary in the first degree? or that a conviction of the former may not be had under an indictment charging the latter? or even assuming that the Supreme Court of Missouri has itself *once* so held that it cannot overrule its former decision—a right reserved and exercised by every appellate tribunal in the land?

II.

The fifth amendment to the Federal Constitution provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and it has been held by this Court that it is *well settled* that the first ten articles of amendment *were not intended to limit the powers of the states in respect of their own people*, but to operate on the *National* government only.

Spies vs. Illinois, 123 U. S. 131 (166).

Hence, assuming that the Missouri statute here assailed does subject a citizen to second jeopardy for the same offense, how is it violative of the Federal Constitution, and by what authority can this Court consider the question?

But the statute in question does *not* punish a second time for the same offense; it requires a most violent stretch of construction to so regard it. It is generally (if not universally) conceded that the primary object of punishment is not retribution, but *to deter* evil disposed persons from violating the express commands of society. And it is generally (if not universally) held that where a person has once violated the law and been punished therefor, and again willfully perpetrates a crime, he may be more severely punished than for the first

offense, seeing that the first punishment failed to accomplish its object. And nothing is more common in criminal jurisprudence than to deal leniently with the law-breaker when it is shown that it is a case of "first offense." The case is but aggravated when a pardon has been granted for the first offense, for there is an implied if not expressed obligation on the part of the pardoned criminal that he will go and sin no more. And though he may by pardon be restored to the privilege of citizenship, forfeited by conviction, it none the less remains a fact that he has been a convicted criminal, and that a second offense is an aggravation of the first, in this, that it shows him to be a determined offender and a menace to society. Therefore in nearly every state of the Union laws of this kind have been passed by the legislature increasing the *amount* of punishment for *successive* offenses—a principle which governs in nearly every social and business organization in respect to penalties imposed upon their members.

And without exception, so far as our research extends, the appellate courts of the several states have held that such statutes are not in conflict with constitutional provisions against a second jeopardy.

People vs. Stanley, 47 Cal. 113 (116).

Ingalls vs. State, 48 Wisconsin 647 (658).

Maguire vs. State, 47 Maryland 485 (495-6).

Plumby vs. Com., 2 Metcalf (Mass.) 413 (415).

Rand vs. Com., 9 Grattan (Va.) 738 (748).

It cannot be reasonably urged that this is *class* legislation, inasmuch as it does not single out a class of citizens arbitrarily and deal with them differently from other persons. And even if so, it can hardly be claimed that a *class* of habitual criminals, persistent violators of law and constant defiers of good order and society, are entitled to the same consideration as those who may have been tempted into crime or who by punishment are reclaimed.

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